82-1735

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ISAAC ROKOWSKY,

Petitioner,

v.

ROBERT GORDON, LOLA JACOBSON, and LOLA JACOBSON, as executrix of the estate of MAURICE GORDON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

Petitioner seeks certiorari to resolve a conflict among the circuits as to the standard governing determination of whether a litigant has tried an unpleaded cause of action by implied consent under Rule 15(b), Fed. R. Civ. P., thus justifying the entry of judgment against him on that unpleaded claim, and to resolve related questions.

Midway through an eleven-day bench trial in a breach-of-contract action, plaintiffs moved to amend the pleadings to assert a new cause of action alleging fraud in the inducement. Defendant expressly objected, and the trial court denied the motion, albeit without prejudice. Relying on the trial court's ruling, defendant did not offer evidence in his possession which, if credited, would have resulted in dismissal of the fraud cause of action. Plaintiffs renewed the motion to amend after the close of evidence, and again defendant objected. The trial court reserved decision.

A year later, the trial court granted plaintiffs' motion to amend, and then—before defendant even learned of its action—entered a ruinous $6.5 million judgment against him on the newly-added fraud cause of action. It did so on the theory that defendant—despite his express objection—had impliedly consented to assertion and determination of the new cause of action. The First Circuit substantially affirmed. In these circumstances, defendant, as petitioner here, raises the following questions for this Court's review:

1. Rule 15(b), Fed. R. Civ. P., permits post-trial amendments of the pleadings to add an unpleaded cause of action only if the parties tried the newly-added cause of action by express or implied consent. When a party expressly objects to the assertion of the newly-added cause

of action at every opportunity, and withholds probative evidence on that claim following the trial court's mid-trial denial of a motion to amend, may consent to trial of the new cause of action nevertheless be inferred merely because two pieces of evidence which arguably relate only to the new cause of action were introduced at trial?

2. Did the immediate entry of judgment against defendant on the cause of action first added after the close of the trial deprive him of his Seventh Amendment right to trial by jury on the new cause of action?

3. Did the immediate entry of judgment against defendant on the new cause of action, when defendant had no prior notice that the cause of action was being tried and, in consequence, no opportunity to present evidence on it, deprive defendant of his Fifth Amendment right to due process of law?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Isaac Rokowsky asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on January 27, 1983.

Opinions Below

The opinion of the Court of Appeals is unreported and appears in the Appendix at 1a. The District Court's original opinion is reported at 501 F. Supp. 1114 and appears in the Appendix at 11a. The District Court's opinion denying petitioner's motion for a new trial is reported at 531 F. Supp. 435 and appears in the Appendix at 30a. An unreported order of the Court of Appeals staying issuance of the mandate appears in the Appendix at 50a.

Jurisdiction

The judgment of the Court of Appeals was entered on January 27, 1983. (App. at 40a.) A timely petition for rehearing and rehearing *en banc* was denied on February 28, 1983. (App. at 47a.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Rules Enabling Act, 28 U.S.C. § 2072, provides in pertinent part:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts . . . in civil actions . . . .
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Federal Rule of Civil Procedure 15(b) provides in pertinent part:

> "*Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

Statement of the Case

The Facts: The trial court found the following facts.

Petitioner Isaac Rokowsky ("defendant") buys and manages real estate on behalf of himself and other investors. Respondents Robert Gordon, Lola Jacobson, and the estate of Maurice Gordon ("plaintiffs") owned real estate in Boston, Massachusetts.

In February 1974, plaintiffs entered into contracts to sell some Boston real estate to Alida Realty, Inc., a shell corporation established by defendant's attorney, for $16 million cash and the assumption of existing mortgages. Alida paid a deposit of $600,000 on the signing of the contracts. The contracts provided that, in the event of a breach by Alida, plaintiffs would be entitled to liquidated damages equal to the deposit. The closing was set for June 1974.

The sale did not close. Some time after the contracts were signed, defendant told plaintiffs that he could not raise the $16 million cash portion of the purchase price

required by the contracts. The closing date was adjourned while the parties negotiated with a view toward restructuring the deal to require less cash and a purchase money mortgage. These negotiations proved fruitless, and, in mid-1975, plaintiffs sold the Boston properties to another purchaser. Plaintiffs never formally called upon defendant to close under the principal purchase contract.

Pretrial: After the properties were sold, plaintiffs sued defendant, Alida, and others for breach of contract. To explain their failure to call for a closing, plaintiffs alleged that defendant (as Alida's principal) had committed an anticipatory breach and had induced them not to close. In consequence, they claimed, defendant was personally liable for the alleged breach of contract. Defendant responded that the contract had been mutually abandoned and, in any event, that only Alida could be liable for any breach,[1] and then only for liquidated damages.

Four years of discovery and pretrial proceedings ensued. Consistent with the pleadings, trial preparation focused on why the deal failed to close—mutual abandonment or repudiation by defendant. Not once in four years did any party hint, let alone give notice, that plaintiffs were asserting fraud in the inducement of the contracts of sale.[2]

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[1] Defendant asserted that Alida was used as the contract vendee, with plaintiffs' knowledge and consent, for the purpose of insulating him from personal liability on the contracts.

[2] In an order staying issuance of its mandate pending the filing of this petition, the Court of Appeals, responding to defendant's petition for rehearing, said that it was a "misstatement" to say that plaintiffs' only claim was for breach of contract, because plaintiffs "also alleged, at the start, fraud in the inducement of the *renegotiated* contracts." (App. at 51a.) (Emphasis added.) With all due respect, the court's remark misses the point. There was no doubt plaintiffs had charged that defendant fraudulently induced extensions of the

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The Trial: Jurisdiction in the district court was based on diversity of citizenship, 28 U.S.C. § 1332. The parties having waived a jury on the contract claim, trial was held before the court (Skinner, J.).

On the sixth day of the eleven-day trial, plaintiffs moved to amend their complaint to add a new and (they admitted) "different" cause of action: that defendant had never intended to pay the original contract price, and thus had fraudulently induced the contracts that were executed in February 1974. Defendant immediately objected to the proposed amendment, pointing out that the parties had taken no discovery on the issue, and that the addition of the new claim would be prejudicial.

The trial court *denied* the motion to amend without prejudice. Not surprisingly, defendant did not offer evidence then in his possession which, if credited, would have resulted in dismissal of the fraudulent inducement cause of action, had that claim been in the case. In particular, defendant had an appraisal showing that the value of the property after the contracts were signed was higher than the contract price—evidence which tended to show that plaintiffs were not injured by signing the contracts of sale, and which he obviously would have offered had he thought the fraud cause of action was in the case.

At the close of trial, plaintiffs renewed their motion to amend, and again defendant objected. The trial court reserved decision.

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closing date in June and July 1974; that charge was crucial to plaintiffs' *contract* case, because plaintiffs had to explain their failure to call for a closing in order to prove their willingness to perform the original contracts. But not even plaintiffs claimed that they had ever pleaded a cause of action for fraud in the inducement of the *original* contracts.

The District Court's Decision: A year later, the trial court entered judgment for defendant on the contract claim. Though finding that defendant was personally liable for breach of contract, the court held that plaintiffs were entitled only to the $600,000 deposit, which was liquidated damages and which they had already received. (App. at 27a.)

The court did not stop there, however. Instead, it granted plaintiffs' motion to add the fraud cause of action, and promptly entered a $6.5 million judgment against defendant on that claim. The court made no mention of defendant's express objections to the motion, and made no finding that defendant had consented to trial on the fraud cause of action. (App. at 28a.)

Post-Judgment Proceedings: Defendant moved for a new trial, arguing that the post-trial amendments of the pleadings and the immediate entry of judgment on the newly-added cause of action deprived him of both due process of law and his right to a jury trial on the fraud cause of action. Defendant noted his reliance on the court's mid-trial ruling denying the motion to amend, and he identified exculpatory evidence he could have presented had he known that the fraud cause of action was to be tried.

The court denied the motion. The court ruled that defendant's right to a jury trial was "subsumed" into an inquiry whether defendant had impliedly consented to trial on the fraud cause of action under Rule 15(b), Fed. R. Civ. P. And this inquiry, the court said, turned solely on whether the record contained evidence relevant only to the fraud cause of action. (App. at 32a.)

Parsing the lengthy trial transcript, the court found two bits of evidence on the basis of which it concluded that defendant had "inferentially recognized" that the cause of

action for fraud was in issue. (App. at 35a.)[3] The court then held that, because the evidence at trial supported the finding of fraud and resulting damages, the fact that defendant could have presented different evidence was insufficient to entitle defendant to a new trial. (App. at 36a-38a.)

The First Circuit's Decision: On appeal, defendant argued that consent to trial on the unpleaded fraud cause of action could not be implied in the face of his explicit objection to the newly-added claim, and, in any event, in the absence of a finding that he squarely recognized that the fraud cause of action was in issue. He argued also that the two bits of evidence on which the trial court relied, even if relevant only to the fraud cause of action, were insufficient as a matter of law to infer a waiver of jury trial on the newly-added claim or notice sufficient to satisfy due process.

The Court of Appeals substantially affirmed.[4] The appellate court agreed with the trial court that defendant's right to a jury trial rested on whether the parties had tried the unpleaded fraud cause of action by consent under Rule 15(b). And the legal standard governing consent, the

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[3] The first instance of evidence on which the trial court relied involved defendant's testimony that he had a commitment from a third party to put up the cash for the original contract price. The evidence was directly relevant to defendant's pleaded claim that plaintiffs had abandoned the contract knowing that defendant could perform and, indeed, the Court of Appeals was unwilling to say that this evidence definitely related only to the unpleaded fraud claim (App. at 7a). The other piece of evidence was one plaintiff's testimony, on cross-examination by defendant, that plaintiffs looked to defendant personally to raise the cash required by the original contracts. That evidence bore directly on plaintiffs' argument, in their breach-of-contract claim, that defendant, and not the shell corporation Alida, was personally responsible for the performance of the contracts; indeed, as the trial court acknowledged, defendant's trial counsel so stated at the time (App. at 35a).

[4] It reduced the trial court's judgments by $540,000. (App. at 10a.)

court held, was "whether evidence was introduced that went only, as distinguished from incidentally, to the issue of fraud in the inducement, and, since the court did not reopen, whether that issue had been fully tried." (App. at 7a.)

In determining whether the issue was "fully tried," the court declined to consider whether additional evidence might have been offered had the issue been pleaded. Rather, having concluded that at least one piece of evidence went only to the fraudulent inducement cause of action, and thus that defendant had "notice" that the fraud cause was in issue, the court held that any further evidence on that claim should have been offered at the trial. (App. at 8a.)

Thus the First Circuit has ruled that consent to trial on an unpleaded cause of action may be inferred—in the face of an express objection—solely on the basis of scraps of evidence gleaned from an eleven-day trial record, and without regard to whether the party against whom the claim is directed squarely recognized that the claim was in issue or whether he would have offered additional evidence had he known the cause of action was in the case. And, the court below has held, those same scraps of evidence are sufficient as a matter of law to deprive a party of his right to a jury trial and to notice of the claim consistent with due process.

Reasons for Granting the Writ

I.

The First Circuit's Decision Conflicts With the Law in Other Circuits That Consent to Trial of an Unpleaded Claim Cannot Be Inferred Unless the Parties Squarely Recognized That the Claim Is Being Tried.

Trial by surprise is the antithesis of the Federal Rules of Civil Procedure. Basic to those Rules is that litigants must be fully apprised of the claims to be tried—by pleading, by discovery, by pre-trial order. A party who tries a claim thus defined is not later free to seek judgment based on a different claim of which the opposing party is unaware. Rule 15(b), instead, allows relief on an unpleaded claim only if the claim was "tried by express or implied consent of the parties."

1. Consent Cannot Be Inferred Unless the Parties Squarely Recognized That the Unpleaded Cause of Action Was in Issue.

There is a sharp conflict among the circuits on the legal standard that should be applied in determining whether a party has impliedly consented to trial of an unpleaded cause of action, and, in consequence, to a Rule 15(b) amendment.

The First Circuit held below that the test is solely "whether evidence was introduced that went only, as distinguished from incidentally, [citation omitted], to the [unpleaded] issue . . . ." (App. at 7a.)[5] Thus, the propriety of a post-trial amendment turns solely on a *post hoc* analysis of the evidence at trial. No consideration is given to whether the

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[5] *Accord, Wallin* v. *Fuller*, 476 F.2d 1204, 1210 (5th Cir. 1973) (discussed *infra*, at 12).

party against whom the amendment is offered in fact understood that the unpleaded claim was being tried or to whether he could have offered additional probative evidence.

This view is in direct conflict with the standard applied in the Third, Sixth, and District of Columbia Circuits. The Sixth Circuit, for example, has expressly rejected this approach to determining the propriety of amendments under Rule 15(b), stating:

> "[A] trial court may not base its decision upon an issue that was tried inadvertently. *Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.*"

MBI Motor Co. v. *Lotus East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974) (emphasis added).[6]

The practical difference between these two standards is vast, and it is well illustrated by contrasting what happened in this case with the Sixth Circuit's *MBI Motor* case.

Here, the only cause of action against defendant that went to trial was for breach of contract. Defendant here not only did not expressly consent to trial of the claim that he fraudulently induced the original contracts, he expressly *objected* to assertion of that unpleaded claim at ever opportunity. And the trial court initially agreed with defendant that plaintiffs' belated amendment should not be allowed; defendant was entitled to, and did, rely on that mid-trial ruling. But the trial court later reversed itself and entered judgment for $6.5 million without any further proceedings.

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[6] *Accord, Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 478 & n.370 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Schultz* v. *Cally*, 528 F.2d 470, 474 (3d Cir. 1975) (discussed *infra*, at 11).

In *MBI Motors Co., supra,* 506 F.2d 709, by contrast, the plaintiff auto dealer alleged that defendant distributor had defrauded him by selling used cars as new. The trial court rejected the pleaded fraud charge on the merits, but nevertheless ruled for plaintiff on the unpleaded theory that defendant had breached a warranty. As in this case, the record contained evidence that related to the unpleaded issue. Nevertheless, the Court of Appeals reversed, holding that the dispositive concern was whether the defendant knew that the unpleaded issue—the breach of warranty theory—was in the case. And it did so despite the fact that evidence relevant to the breach of warranty theory was received without objection.

To the same effect, and equally in collision with the First Circuit's ruling, is the Third Circuit's decision in *Schultz* v. *Cally,* 528 F.2d 470 (3d Cir. 1975). There, defendants, who believed they were trying only common law fraud issues, failed to object to evidence of interstate contacts which could have been relevant only to an unpleaded federal securities claim. The trial judge instructed the jury, and the jury found for plaintiff, on the unpleaded federal claim. Vacating the judgment, the Court of Appeals held that the proper legal standard to determine consent to trial of the federal securities law claim was not whether the record contained unchallenged evidence bearing only on the unpleaded issue, but whether *"the non-objecting party was fairly apprised that the evidence went to the unpleaded issue."* 528 F.2d at 474, quoting *Niedland* v. *United States,* 338 F.2d 254, 258 (3d Cir. 1964) (emphasis in *Schultz*).[7]

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[7] *Accord, Laffey* v. *Northwest Airlines, Inc.,* 567 F.2d 429, 478, n.370 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978) ("essential inquiry is the understanding of the parties as to whether the unpleaded issue was being contested"); *see also Monod* v. *Futura, Inc.,* 415 F.2d 1170, 1174 (10th Cir. 1969) ("the test of consent" was whether defendants had "a fair opportunity and whether they could offer any additional evidence if the case were to be retried on a different theory").

The First Circuit's departure from these cases is no isolated event. The rule in Fifth Circuit, on which plaintiffs relied below, focuses as well only on the existence of evidence in the record that may relate to the unpleaded issue alone, without regard to whether the opposing party is aware that the evidence is to be relied upon in support of an unpleaded claim. In *Wallin* v. *Fuller,* 476 F.2d 1204, 1210 (5th Cir. 1973), for example, the Fifth Circuit, noting evidence in the record which was "much more strongly relevant" to an unpleaded issue than the one in the complaint, overturned a trial court's refusal to instruct the jury on the unpleaded theory. Like the First Circuit here, the Fifth Circuit holds that consent can be divined from snippets of evidence alone, and that a party's unwitting failure to object to isolated testimony exposes the party to judgment on unpleaded claims of which he was unaware.

Such a rule of inadvertent consent is utterly foreign to the language and purpose of Rule 15(b). Trial "by consent" allows parties fully and fairly to litigate unpleaded issues which the parties agree should be resolved. But consent connotes a voluntary and willing concurrence, which presupposes knowledge. Knowledge that a claim is in the case is an obvious condition to meeting it. That Rule 15(b) does not require an expression of consent—that it allows a court to find consent by implication—is no license to disregard the parties' understanding of the issues. "[I]t cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial." 3 J. Moore, *Federal Practice* ¶ 15.13[2] at 15-173 (2d ed. 1982).[8]

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[8] Precisely that standard governs the determination whether a claim was "actually litigated" in one suit for the purpose of applying collateral estoppel in another. Thus, there is no estoppel to re-try

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A party's understanding of the issues cannot be measured solely by unchallenged evidence bearing on the claim (a neutral fact for which there might be numerous explanations), nor from an after-the-fact view of the sufficiency of the record (which says nothing about what the parties understood at the time). Determining consent by such standards alone not only indulges unreasonable inferences, but also presents a litigant with the Hobson's choice of offering evidence on an unpleaded issue he was not fully prepared to address (risking a charge that he consented to trial of the issue) or of holding back the evidence on the assumption that the issue is not in the case (risking a later holding that it was). The uncertainty latent in that choice is an anachronism in modern federal procedure, a throwback to a sporting theory of litigation.[9]

Certiorari should be granted to resolve the conflict among the circuits as to the standard for determining implied consent under Rule 15(b).

2. Consent Cannot Be Inferred When a Party Explicitly Objects to the Newly-Added Cause of Action.

Compounding the confusion is the First Circuit's categorical declaration that an express objection to an un-

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an issue when, in the prior proceeding, "a judge has made a specific finding on the basis of evidence that was not understood by the parties to go to the issue found." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4419 at 177 (1981); *see Restatement (Second) of Judgments* § 27 (1981). It cannot be that the standard governing whether an issue can be tried again is higher than the standard governing whether the issue was tried by consent in the first place.

[9] When constitutional rights are involved, moreover, the standard is necessarily inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072. *See* Point II *infra*.

pleaded claim does "not mean that implied consent could not be found" (App. at 6a)—a ruling which occasions a subsidiary conflict among the lower courts and which stands the meaning of consent on its head. An explicit objection to an unpleaded claim is the most obvious way to register a *lack of concurrence,* and a court's sustaining of the objection—at the point in trial when it makes a difference—is the most apparent indication of the parties' *lack of knowledge* that the claim was to be tried. The First Circuit's contrary standard thus deprives litigants of the most reliable means of assessing whether the claim is in the case.

Exactly the opposite standard was adopted in *Nerenhausen* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 479 F. Supp. 750 (D. Minn. 1979). There, plaintiff made a mid-trial motion to add a new claim directly against a third-party defendant. The third-party defendant, noting that its conduct of the trial would have been different had the claim been pleaded, objected to the amendment, and the court denied the motion. When plaintiff later renewed the motion at the end of trial, the court said that decision on the post-trial motion was "inextricably bound to the denial of its [sic] previous motion." "When a party objects to a proposed amendment, and such an objection is upheld," the court declared, "any factual issues which are raised during trial are not tried by express or implied consent of the objecting party." *Id.* at 753-54.[10]

* * *

[10] District courts within other circuits have reached the same conclusion. *See, e.g., McGraw* v. *Matthaei,* 388 F. Supp. 84, 89 (E.D. Mich. 1972) (no implied consent when "defendant strenuously objected to plaintiff's" newly-added issue); *Locke Mfg. Cos.* v. *United States,* 237 F. Supp. 80, 89 (D. Conn. 1964) (no implied consent when "plaintiff's counsel expressly objected to the introduction of such issue"); *Gaines W. Harrison & Sons, Inc.* v. *J. I. Case Co.,* 180

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The legal standard embraced by the First Circuit in this case both conflicts with that of other circuits and is a summons to trickery by litigants in search of a winning theory. The standard allows a party who senses imminent defeat on the pleaded issues to attempt to smuggle a different theory into the case with evidence that may appear innocuous at the time. Inferring knowledge of and concurrence in trial on that issue merely from the opposing party's failure to object to evidence disregards the plain meaning of consent, fosters a constant uncertainty about the issues to be tried, penalizes reliance on judicial rulings, and invites trial by ambush. The result is devastating judgments (here in the millions of dollars) that may bear no relationship to the outcome that would have prevailed had the opposing party recognized that the issue was being tried and been given the opportunity to contest it.

The confusion and conflict in the lower courts on this issue signal the need for this Court's guidance. This Court should put an end to the disarray.

II.

The Immediate Entry of Judgment on a Cause of Action Added to the Pleadings After Trial Deprived Defendant of His Seventh Amendment Right to Trial by Jury.

This is a particularly appropriate case for certiorari because the First Circuit's decision reflects profound confusion not only about the legal standard for determining implied consent under the Federal Rules, but also about the

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F. Supp. 243, 248 (D.S.C. 1960) (implied consent argument "patently unsound" because "as soon as the [unpleaded defense] was raised, the plaintiff took the position that it was not before the court").

standard governing waiver of a jury trial under the Seventh Amendment.

It is not uncommon for new issues to emerge in a civil case in which the parties had previously waived a jury trial. And the courts uniformly hold that if the new issues otherwise would be triable to a jury, then the parties are entitled to demand a jury on those issues within the time set by Rule 38, Fed. R. Civ. P., notwithstanding the prior waiver of a jury on the old issues.[11] The only exception to this rule occurs when the parties waive the jury on the new issues. The federal rules are silent on, and this Court has never addressed, the legal standard to determine whether such waiver has occurred.

By subsuming the question whether defendant waived a jury on the new cause of action into an inquiry under Rule 15(b), the courts below ruled here that a party's failure to object to evidence that later turned out to bear on an unpleaded cause of action was alone sufficient to constitute a waiver of the Seventh Amendment. That ruling, which again places the First Circuit in conflict with other courts, raises the second question on which we seek review: did immediate entry of judgment against defendant on the unpleaded cause of action deprive him of his Seventh Amendment right to trial by jury in view of the fact that defendant never waived a jury by any conventional standard?

It is basic that "[t]rial by jury is a vital and cherished right, integral in our judicial system." *Morgantown* v. *Royal Insurance Co.*, 337 U.S. 254, 258 (1949). The Seventh Amendment "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right

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[11] *See, e.g., In re Zweibon*, 565 F.2d 742, 747-48 (D. C. Cir. 1977); *First Wisconsin Nat'l Bank* v. *Klapmeir*, 526 F.2d 77, 80 (8th Cir. 1975).

to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 393 U.S. 474, 486 (1935). And because "the right of jury trial is fundamental," courts must "indulge every reasonable presumption against waiver." *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937).

The First Circuit's standard ignores these teachings. Plaintiffs' common law fraud claim was triable to a jury. That plaintiffs waited until the middle of trial to raise that claim, or that the court waited a year after trial to allow the amendment, did not and constitutionally could not waive defendant's right to demand that the disputed facts of that cause of action be found by a jury. Only defendant could waive that right. Defendant asked for a jury at the first opportunity. He was entitled to receive that jury absent evidence of an express and knowing relinquishment of his constitutional right.

Other circuits hold that the right to trial by jury is not waived by the sort of ambiguous conduct we have in this case—a mere failure to object to evidence arguably relevant only to an unpleaded cause of action.

In *Heyman* v. *Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972), for example, the trial court had stricken a jury demand on the ground that the party making demand had failed to object—not to unheralded evidence supposedly related to an unpleaded issue—but to an explicit statement by the court that trial would be to the bench. The Second Circuit vacated the judgment, and granted a new trial, holding that such passivity alone was insufficient to show an express and knowing waiver:

> "The right to jury trial is too important, and the usual procedure for waiver of the right too clearly set out by the Civil Rules for courts to find a know-

> ing and voluntary relinquishment of the right in a doubtful situation. . . . We would fail to recognize the important place of the civil jury in the pantheon of our liberties were we to hold its use so easily lost. *Waiver, prior to the time for demanding jury trial has begun, should be based on nothing less than an affirmative representation by the party himself, or by his duly authorized counsel,* on representation to the court that the matter has been discussed with the client and that the client has determined not to exercise his right to jury trial." 456 F.2d at 129-30 (emphasis added).

Accord, Bruce v. *Bohanon,* 436 F.2d 733, 736-37 (10th Cir. 1970), *cert. denied,* 403 U.S. 918 (1971) (on similar facts, Tenth Circuit reversed, holding that waiver can only be achieved by "expressed assent by counsel that the trial be to the court and not to the jury").[12]

The Fifth Circuit has adopted the same view. In *Bowles* v. *Bennett,* 629 F.2d 1092 (5th Cir. 1980), the trial court had combined a hearing on preliminary injunction with a trial on the merits, including damages issues. Following the hearing, the court entered judgment denying the injunction and dismissing the damages claim. Plaintiff moved for a new trial, and demanded a jury trial as part of the motion (as defendant here did). The trial court rejected

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[12] The requirement that a waiver of constitutional right be "knowing and intelligent" has been applied to civil contexts involving a variety of constitutional rights. *E.g., Sambo's Restaurants, Inc.* v. *Ann Arbor,* 663 F.2d 686, 690 (6th Cir. 1981) (right of free speech); *Mosley* v. *St. Louis Southwestern Ry.,* 634 F.2d 942, 946 (5th Cir.), *cert. denied,* 452 U.S. 906 (1981) (right to counsel in administrative proceedings); *Illinois State Employees Union* v. *Lewis,* 473 F.2d 561, 571 (7th Cir. 1972), *cert. denied,* 410 U.S. 943 (1973) (right of association). *Cf. Johnson* v. *Zerbst,* 304 U.S.. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right").

the demand, finding that plaintiff had consented to the combined hearing, but the Court of Appeals reversed:

> "The essential inquiry before us is whether the plaintiffs expressly or impliedly waived their right to jury trial. *A waiver occurs only by the passage of the time limitation or, prior to that time, by some express action by the party or his attorney which evidences his decision not to exercise the right.* Neither occurred in this case. Even assuming that plaintiffs' counsel had agreed to consolidate the injunction hearing with the trial on the merits, that, alone, would not be an express waiver of the right to jury trial." 629 F.2d at 1095 (emphasis added).

The standard can be no different in the context of Rule 15(b). The Rules Enabling Act, 28 U.S.C. § 2072, prescribes that rules of procedure "shall preserve the right to trial by jury," and thus any implication of "trial by consent" must be made in harmony with Seventh Amendment principles. Fidelity to those principles requires that a trial of an unpleaded claim to the court be accompanied by an express waiver of the right to a jury. And when a party expressly objects to a newly-added cause of action triable to a jury, and demands a jury upon the court's allowance of the new cause of action, then the court must give him one.

Directly on point, and squarely in conflict with the First Circuit's decision, is *Johnson* v. *Harrah's Club*, 30 Fed. R. Serv. 2d 1153, 1153-54 (9th Cir. 1980). In that case, the trial judge permitted plaintiff, over defendant's objection, to add an unpleaded claim, on which the court promptly entered judgment. The Court of Appeals reversed, holding that defendant was thereby denied his Seventh Amendment right to a jury. The Ninth Circuit said that, even if defendant's objection to the newly-added claim was not sufficient to constitute a demand for a jury,

"the basic and fundamental nature of the right to a trial by jury" required that defendant be afforded the right to jury trial.[13]

This Court's direction is needed to resolve the conflict over the interplay between Rule 15(b) and the right to jury trial, and, more generally, the conflict over the legal standard governing waiver of the Seventh Amendment. "The federal policy favoring jury trials is of historic and continuing strength," and "uniformity in its exercise is demanded by the Seventh Amendment." *Simler* v. *Conner*, 372 U.S. 221, 222 (1963) (per curiam). The First Circuit's standard devalues that right by resting a party's entitlement to a jury, not on that party's informed judgment about who should find the facts, but on the trial judge's perception about what the facts show. That standard should be corrected, and the conflict in the circuits resolved.

III.

The Immediate Entry of Judgment on a Cause of Action Added to the Pleadings After Trial Deprived Defendant of Due Process.

The third and final question on which we seek review is whether entry of judgment on an unpleaded cause of action, without affording defendant the opportunity to discover and present evidence on critical elements of the claim, deprived defendant of due process.

Defendant completed his discovery in this case before the fraud cause of action was even mentioned. During the trial, defendant nevertheless possessed some evidence

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[13] By local rule, the *Johnson* decision may not be cited as precedent in the Ninth Circuit.

tending to negate any finding of reliance by plaintiffs, and to show that plaintiffs had not been damaged at all by the adjudged fraudulent inducement of the contracts. Not knowing that the court would change its mind and allow the amendment, and unaware that an unpleaded claim that could spell his financial ruin might be determined without any opportuninty to present his evidence, defendant did not offer the evidence. It is logically unsound and constitutionally untenable to presume adequate notice of the claim in such circumstances.

The most abiding tenet of our jurisprudence is that a party cannot be deprived of property without notice or opportunity to be heard. " 'Parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified.' " *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972) (quoting *Baldwin* v. *Hale,* 68 U.S. [1 Wall.] 223, 233 (1863)). "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States,* 304 U.S. 1, 18 (1938).

The First Circuit's ruling here—that defendant received sufficient notice of an unpleaded cause of action because there were two scraps of evidence amid a two-week trial which defendant reasonably believed were related to the claims already in issue—reduces due process to a game of hide-and-seek. Yet notice, "to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences," *Central Illinois Public Service Co.* v. *United States,* 435 U.S. 21, 38 (1978) (Powell, J., concurring). And because actual prejudice inheres in the denial of such notice, no constitutionally-proper judgment may be entered against defendant absent an opportunity to be heard on the newly-added claim.

Cf. Armstrong v. *Manzo,* 380 U.S. 545, 552 (1961) (vacating judgment entered without notice, notwithstanding merits of claim); *Wuchter* v. *Pizzutti,* 276 U.S. 13, 24 (1928) (same).

The First Circuit's ruling promises untoward consequences that extend far beyond the injustice of this case. Civil litigants will be at constant risk that an adversary will introduce evidence which might be relevant to an unpleaded claim and which a court might later deem a full trial by consent. And litigants will have every incentive *not* to plead a related cause of action, lest notice of the claim and an opportunity to be heard expose the claim to defeat. That ruling cannot be condoned.

Conclusion

Defendant was sandbagged. He prepared and tried a defense to a contract claim. He won. Plaintiffs saw the loss coming, and they attempted to switch gears at midpoint. The trial court initially rejected the attempt, and defendant tried the rest of his case relying on that ruling. When the trial court changed its mind a year later, its rush to judgment disregarded defendant's understanding of the issues to be tried, deprived him of his right to a jury trial, and denied him the opportunity to be heard in opposition to a staggering liability.

The First Circuit's blessing of the judgment presents the model for granting certiorari under this Court's Rule 17. The conflict among the circuits about the appropriate standards for inferring consent under Rule 15(b) and for finding a waiver of the Seventh Amendment rights is likely not only to increase the confusion among courts and litigants over basic issues of federal practice, but also to invite litigants to prolong disputes in an extended search

for a palatable result. Unless this Court intervenes, defendant here will be the victim of federal rules invoked, not to achieve a just result within an orderly system of dispute resolution, but to obtain a catch-as-catch-can judgment in derogation of constitutional norms.

We ask this Court to grant certiorari in order to resolve the conflicts here raised, and to provide instruction on important and recurring questions of constitutional procedure.

Dated: New York, New York
April 25, 1983

Respectfully submitted,

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APPENDIX

First Circuit's Opinion [Unpublished]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 81-1021

ISAAC ROKOWSKY,

Plaintiff, Appellant,

v.

ROBERT GORDON, *et al.*,

Defendants, Appellees.

Nos. 82-1106, 82-1107 and 82-1187

ROBERT GORDON, *et al.*,

Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,

Defendants, Appellees.

ISAAC ROKOWSKY,

Defendant, Appellant.

No. 82-1186

LOIS JACOBSON, *et al.*,

Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,

Defendants, Appellees.

ISAAC ROKOWSKY,

Defendant, Appellant.

First Circuit's Opinion

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before:

Coffin, *Chief Judge*,
Aldrich and Swygert*, *Senior Circuit Judges*.

LEWIS A. KAPLAN, with whom ARYEH S. FRIEDMAN, and PAUL, WEISS, RIFKIND, WHARTON & GARRISON were on brief, for appellant.

ARTHUR M. GILMAN, with whom DAVID G. HANRAHAN, MICHAEL EBY, and GILMAN, MCLAUGHLIN & HANRAHAN were on brief, for appellees.

January 27, 1983

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* Of the Seventh Circuit, sitting by designation.

First Circuit's Opinion

ALDRICH, *Senior Circuit Judge*. These appeals are the result of three actions, the first instituted by Isaac Rokowsky on a promissory note, with cross actions for breach of contract, hereinafter the counterclaim, arising out of a contract to purchase, as a group, 28 downtown Boston buildings. We would say at the outset that the case has been a lesson in real estate practices that we might hope are sufficiently atypical to be of no future use. Except as to damages, we affirm.

The case was tried to the court, and its extensive findings in two opinions, *Rokowsky* v. *Gordon*, D.Mass., 1980, 501 F.Supp. 1114; s.c. 1982, 531 F.Supp. 435, need not be repeated in detail. The principal issues on appeal revolve around the court's permitting, under F.R.Civ.P. 15(b), an amendment to the counterclaim, after the close of all the evidence, to allege that Rokowsky fraudulently induced the execution of the contract. The motion to amend, first made on the sixth day of an eleven day trial and renewed at the end of trial, was based on evidence that tended to show a misrepresentation that Rokowsky had available, and intended to pay as part of the purchase price, $16 million in cash. The court credited this evidence and ruled that fraud in the inducement had been established. This finding, factually, presents no debatable question.

In brief, the contract, initially negotiated to call for a payment of $42 million, $6 million in cash, $20 million by assumption of existing mortgages, and a $16 million purchase money mortgage to be taken back by the Gordons, was modified before final agreement, because of objections to a purchase money mortgage, to call for a total payment of $38 million by assumption of the $22 million balance of existing first mortgages and $16 million in cash. The

$16 million was represented to be forthcoming from a wealthy British investor, one Freshwater. A deposit was made into escrow of $600,000, $540,000 with respect to 26 and $60,000 with respect to the remaining 2 buildings, separately owned. This amount was specified in the contract to be liquidated damages in case of the buyer's default.

The contract was entered into in February, 1974, closing to take place in June. Following execution, everything was down hill. When the closing date was approaching, Rokowsky stated that because of a world-wide depression Freshwater was unable to meet his commitment. Rokowsky stated then, however, and repeated frequently thereafter, that Freshwater would provide him with $6 million in cash and proposed that the Gordons take back purchase money mortgages for the $10 million balance, the avoidance of which had caused, at least in part, the Gordons to surrender $4 million at the outset. Believing the Freshwater explanation, the Gordons agreed to revise the contract, subject to release of the deposit in escrow, because needed to pay taxes. For this Rokowsky negotiated for, and received, a non-negotiable promissory note from the Gordons to him for $540,000, the amount of the primary deposit; the $60,000 was arranged for differently.

Thereafter it appeared that Rokowsky could not get the $6 million, either; there was talk of subordinating the $10 million purchase money mortgage to a $3.5 million bank mortgage, and, eventually, as Rokowsky's counsel stated graphically in his opening, "It just sort of negotiated itself into the dust," from whence, we might add, it came. Later the Gordons found a new purchaser, but at a reduction of $6,468,273, for which loss, by finding the ultimate purchasers paid the fair market value at the date of breach, the court held Rokowsky accountable on the added fraud

count. 501 F.Supp. at 1123-24; 531 F.Supp. at 439. On the contract counterclaim the court entered judgment for Rokowsky, the Gordons having already received, as the initial deposit, the specified amounts of liquidated damages.

One of the issues noted in the pretrial memoranda was whether Rokowsky's representation, in connection with revising the agreement, that he had $6 million available was fraudulent. No question was raised with respect to the $16 million commitment. However, during trial, Rokowsky himself constantly asserted it, possibly in connection with his concession that from the start he sought to renegotiate the contract by telling untruths. When this unabashed conduct ultimately induced the court to voice its surprise, counsel responded,

> "It is our position, it is perfectly sound business practice and prevalent in the area from which my client comes to negotiate a contract to the very last moment."

For reasons of his own Rokowsky contended that this was not inconsistent with the $16 million commitment. In his main brief he stated that the purpose of this profession was an attempt "to harmonize his renegotiation efforts with his contention that he had a commitment from Freshwater by explaining that he felt under a duty to minimize the amount of cash necessary to close the transaction . . . notwithstanding the Freshwater commitment." In this it would appear that he was fleeing from a charge that had never been made.

Rokowsky's admitted practice, amply supported by the evidence, was that once the contract was made, with a small deposit, the buyer, rather than stopping at the contract, continues to negotiate the seller into a corner; cost, nothing, so long as it works; nothing more than the deposit

if it does not work, and even then, as this case demonstrates, the buyer may seek to recover the deposit. The reason for this conduct, Rokowsky explained, is that it is always to the buyer's advantage to negotiate down and keep the sellers involved in the properties, viz., as purchase money mortgagees, reducing the agreed cash payment as much as possible.

While Rokowsky's logic, as distinguished from his ethics, may have been sound, we consider it was not unreasonable for the court to combine this admitted conduct with the fact of no semblance or prospect of a commitment to begin with and conclude that there were misrepresentations as to ability and intent to perform, both material matters as constituting fraud in the inducement.

Whatever may have been the purpose of Rokowsky's opening the issue of the contract's initiation and the $16 million commitment,* the fact is he did, not incidentally and collaterally, but as a direct and fully litigated matter. The fact that he objected to the amendment to conform with what it led to did not mean that implied consent could not be found from his conduct. *See, e.g., Dunn* v. *TWA,*

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* In his reply brief counsel state,

> "Mr. Rokowsky's position was that the Gordons knew that Freshwater had agreed to put up the $16 million in cash [which, Rokowsky testified '[a]t all times,' he told them 'I know that Mr. Freshwater will come forward with . . . anytime I asked him,'] but nevertheless did not call for a closing; they instead acquiesced in Mr. Rokowsky's request to renegotiate the deal in order to accomodate his desire to obtain outside financing,"

—a project based on $6 million in cash and that ultimately included purchase money mortgages. Having in mind that the Gordons had no discernable interest in delay (the contract stating time to be of the essence), and had reduced their original price by $4 million for the very purpose of avoiding purchase money mortgages, this is kindness that even Rokowsky's introducing his main brief with quotations from *Alice's Adventures in Wonderland* did not prepare us for.

Inc., 9 Cir., 1978, 589 F.2d 408, 412-13; *deHaas* v. *Empire Petroleum Co.*, 10 Cir. 1970, 435 F.2d 1223, 1228-29; *Cohen Sons & Co.* v. *Koch*, 1 Cir., 1967, 376 F.2d 629, 632-33. This leaves two questions: whether evidence was introduced that went only, as distinguished from incidentally, *cf. Vargas* v. *McNamara*, 1 Cir., 1979, 608 F.2d 15, 18 n.3, to the issue of fraud in the inducement, and, since the court did not reopen, whether that issue had been fully tried.

As to the first, the question of the $16 million commitment probably, and of the Gordons' reliance necessarily, went only to the issue of fraud in the inducement. Passing the fact that Rokowsky failed to object to the Gordons' inquiry as to his intention not to perform the original agreement—which he denied—Rokowsky raised no objection to, and, indeed, actually elicited affirmative testimony that the Gordons relied on the Freshwater commitment. In his reply brief he says that this testimony was relevant to the original case as tending to rebut his claim that Alida, Inc., a promiscuous straw of Rokowsky's real estate counsel that signed the contract, was the principal rather than Rokowsky's agent. This is no answer. From the standpoint of ordinary breach of contract, if there is a liquidated damage clause and the full damages have been placed in escrow, the identity of the buyer is irrelevant. The seller, however, may be more interested in performance than he is in recovering damages. In that connection he has an initial concern with the buyer's ability and intent. A material misrepresentation in this respect is, precisely, fraud in the inducement. For a seller to contend that he relied upon such representations is to raise that issue, and that issue only. Rokowsky is evading the point in arguing the issue addressed was the straw's position. Rokowsky's financial backing related to inducement.

As to whether he had a fair trial thereon, Rokowsky asserts that if he had realized that initial fraud was in the case he would have offered certain deposition testimony to the effect that the Gordons did not, in fact, rely upon the Freshwater commitment. However, having allowed Robert Gordon to testify, without objection, that he did rely, the time for Rokowsky to act was then, by cross-examination, rather than now by claiming the issue was not in the case.

Next, he argues the court should not have excluded his testimony as to a conversation with Freshwater prior to making the contract. Passing the fact that no offer of proof was made, a normally necessary requirement, Fed. Ev. R. 103(a)(2), we may assume the correctness of the claim that it would "show Mr. Rokowsky's state of mind to negate the charge of knowing misrepresentation." This contention overlooks the elementary principle that a misrepresentation of a positive fact, capable of being known, and which is relied on, is not saved by subjective good faith. *Pietrazak* v. *McDermott,* 1960, 341 Mass. 107, 110.

Nor are we moved by the complaint that Rokowsky was deprived of a jury trial on the added issue. A waiver takes place in the framework in which it is made. This is not a case where the amendment called for a further trial. *See* post. *Compare Arber* v. *Essex Wire Corp.,* 6 Cir. 1974, 490 F.2d 414, 423-24, *cert. denied,* 419 U.S. 830, with *In re Zweibon,* D.C.Cir., 1977, 565 F.2d 742, 747-48 & n.20. *See, generally,* 5 Moore, *Federal Practice* ¶ 38.41 (2d ed. 1982).

As a last stand Rokowsky argues that even if fraud was raised and litigated at trial, the court did not find that the Gordons relied on his representation as to the commitment. While there was no express finding in the court's first

opinion, we agree with what it said in the second, that taking the properties off the market raised a "monumental presumption of reliance." 531 F.Supp. at 439. Reliance was too plain not to admit of an implicit finding in the court's general finding, even if it did not state it explicitly.

In sum, we find no abuse of discretion in the court's allowance of the amendment under Rule 15(b), nor in the making of an immediate finding without reopening. As to this latter, Rokowsky had his chance. When, at the close of the case, the court took the motion to amend under advisement, his only answer to the court's question of what was omitted, in which it said, "You have climbed up one side and down the other on every aspect of this case," was that "this came too late in the proceeding for me to have to take that question." Rokowsky claims that he "awoke [eleven months later] to discover that a $6.5 million judgment had been entered against him." By the same token he had allowed eleven months to pass without answering the court's question.

As to the measure of damages, we find no error in law or in fact. We affirm on the opinions below. 501 F.Supp. at 1123, 531 F.Supp. at 439. The $540,000 note traceable to the deposit, however, is a different matter. On its face, the obligation was unconditional. If parol evidence was admissible to make it conditional, a matter briefed at length by both sides, it was to the effect that the note should be payable "only (1) by way of a credit against purchase price at a closing of the real estate agreement or (2) in the event of a default by the Gordons." 501 F.Supp. at 1122. Admittedly there was no default by the Gordons. However, if the first condition is read into the note the Gordons gain nothing by it. They cannot recover full damages for fraudulent inducement of the contract and,

at the same time, retain the liquidated damages for breach. This duplication of recovery suggests that the court was so concerned over Rokowsky's conduct that it lost sight of the fact that overreaching is a game that two can play.

Parol evidence or no, Rokowsky must be credited with the note; the judgment on the fraud counterclaim on the 26 buildings must be reduced by the amount already received on the purchase price, viz., $540,000. While this reasoning would entitle Rokowsky to a further credit of the $60,000 deposit with respect to the remaining two buildings, he did not make this claim, either below, *see* 501 F.Supp. at 1120, or here, and we do not consider it before us. As thus modified, the judgments are affirmed. Costs to appellees.

District Court's Original Opinion
[501 F. Supp. 1114]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ISAAC ROKOWSKY, *et al.*,

Plaintiffs,

v.

ROBERT GORDON, *et al.*,

Defendants.

Civ. A. Nos. 78-3316, 3259 and 3260

November 19, 1980

Barry I. Fredericks, Goldschmidt, Fredericks, Kurzman Oshatz, New York City, for Isaac Rokowsky, Michael Swerdlow & Alida Realty, Inc.

David Hanrahan, Gilman, McLaughlin & Hanrahan, Boston, Mass., for Dorothy Gordon, Lola, Jacobson as executrices of Estate of Maurice Gordon.

Arthur M. Gilman, Boston, Mass., for Robert Gordon and Lola Jacobson.

FINDING, RULINGS, AND ORDER FOR JUDGMENT

SKINNER, District Judge.

These three consolidated cases arise out of an aborted agreement to sell commercial real estate in Massachusetts. In the first case, Rokowsky, one of the prospective purchasers, seeks to recover on a promissory note in the amount of $540,000 issued in the course of the deterioration of the

transaction. In the second and third cases, Robert Gordon and his sister Lola H. Jacobson, owners of the beneficial interest in 26 of the 28 parcels to be sold, and the executrices of the Estate of Maurice Gordon, which owned the other two parcels, claim damages for breach of contract against Alida Realty, Inc., the nominal purchaser, and its disclosed principals Isaac Rokowsky and Michael Swerdlow. By amendment, they also seek damages for fraud in the inducement of the agreement.

In the second and third cases, Rokowsky and the other defendants have counterclaimed for fraudulent misrepresentation concerning the outstanding leases of some of the properties and their operating costs.

FINDINGS OF FACT

Swerdlow, a New York lawyer, learned that the Gordon properties were for sale sometime in 1973. He entered into preliminary negotiations with representatives of the Gordons. He then contacted Isaac Rokowsky, also of New York, who was and is a broker and dealer in real estate and real estate financing. Mr. Rokowsky was originally brought into the deal to provide the money and to negotiate the financial aspects of the transaction. In fact, all of the subsequent negotiations were conducted for the buyers principally by Rokowsky, with the assistance of his lawyer, Edward Breger, Esq.

Mr. Rokowsky in turn contacted Mr. Ben Zion Schalom Eliazor Freshwater, an English financier, who was at that time assisting his father Osias Mayer Freshwater, the managing director of the Freshwater Group of companies, a complex of over 200 public or private companies with very large real estate holdings. Rokowsky represented the Freshwater Group in many of its transactions in the United States.

Since the death of his father, Mr. Ben Zion Schalom Eliazor Freshwater has been the managing director of the Freshwater Group. I find that Mr. Freshwater put up the initial deposit of $600,000 and expressed an interest in putting up additional funds, in return for some shares in the properties purchased. I find that Mr. Freshwater never committed himself or his companies to put up any specific amount of cash over and above the initial $600,000 and that the size of his share in the property to be purchased was never settled. I find, however, that he was an undisclosed principal in this transaction, that he anticipated sharing in the property, and that he instructed Mr. Rokowsky to proceed with efforts to secure the property.

After considerable negotiation, two parallel purchase and sale contracts were exercised, the first between the various real estate corporations owned by Robert Gordon and Lola H. Jacobson as sellers, and Alida Realty, Inc. as buyer, and the second between the executrices of the Estate of Maurice Gordon as sellers and Alida Realty, Inc. as buyer. I find that the two contracts were treated by all concerned as parts of a single transaction. These contracts were executed February 12, 1974, and called for a closing on June 28, 1974. They specify that they "shall be construed and enforced in accordance with the laws of Massachusetts."

[1] I find that Alida Realty, Inc. was a dummy corporation created by Attorney Breger for the convenience of his clients. At the beginning of each year he created such a corporation to act as a straw or conduit for his clients. At the end of the year the corporation would be dissolved. The office dummy for 1974 was Alida Realty, Inc. It had no assets, no capital stock and no stockholders. During 1974 it acted as a straw or conduit for over 100 of Mr. Breger's clients in over 200 transactions. It was contemplated that after the closing, the property would immediately be trans-

ferred to Rokowsky, Swerdlow and Freshwater in whatever proportion was eventually worked out among them. All the contract negotiations were conducted or controlled by Rokowsky, who was not an officer of Alida Realty, Inc.

[2] Rokowsky and Swerdlow now assert that Alida Realty, Inc. was known to all parties to be the purchaser and that the sellers knew that they could only look to the corporation for any damages. I reject this contention. I find that the sellers justifiably considered Rokowsky and Swerdlow to be the principals in the transaction, that they looked to them personally to raise the necessary financing, and that Alida Realty, Inc. was treated by all parties as a device of convenience, to hold title temporarily as a straw or conduit. I find and rule that Rokowsky and Swerdlow are not protected from whatever liability there may be under the February 12 contracts by reason of the use of Alida Realty, Inc. as a nominee. *My Bread Baking Co.* v. *Cumberland Farms, Inc.*, 353 Mass. 614, 233 N.E.2d 748 (1968).

Both contracts contained provisions for liquidated damages, however, in effect limiting the liability of the purchasers for breach of contract to the amount of the deposit on each contract, which was $540,000 in the corporation's contract and $60,000 in the estate contract. The deposit and the liquidated damages provision were both incorporated in Paragraph R of each agreement, which were identical.[1] This provision reinforces the conclusion reached

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[1] R. The Escrow Agents join herein to acknowledge their receipt of the deposit, in whatever form it takes, in accordance with the provisions of Paragraph E hereof, and their undertaking to hold and dispose of the same as follows:

(footnote continued on following page)

above that the parties did not rely on the corporate nominee to limit liability.

Prior to the execution of the contract, various lawyers and real estate management experts had viewed all the Gordon buildings and had examined many of the leases. After February 12, 1974, this activity intensified. Moe Bordwin, an associate of Swerdlow, took up permanent residence outside of Boston, and with a small legal and clerical staff proceeded to go through all the leases, contracts, payrolls and other documents relating to the various properties. Robert Gordon provided office space to Mr. Bordwin for this purpose and gave him unrestricted access to the pertinent files.

On June 12, 1974, Attorney Breger wrote a letter to the sellers' attorney containing a long list of alleged discrepancies in descriptions of the properties as recited in the contract documents and alleged deficiencies in documentation. In a rare moment of candor, however, Mr. Rokowsky conceded at the trial that the true extent of the property was known to him and that he never intended to purchase the areas erroneously included in the contract descriptions. The other matters were either of no consequence or were corrected in due course.

(footnote continued from preceding page)

(i) At the closing to deliver the same to the Sellers and the interest thereon, if any, to the Buyer;

(ii) If, at the time and place for closing, the Buyer shall default in the performance of its obligations hereunder, to deliver the same and interest thereon, if any, to the Sellers, as liquidated damages;

(iii) If, at the time and place for closing, the Sellers shall default in the performance of their obligations hereunder, to deliver the same to the Buyer, without prejudice to such default;

subject, in all of such cases, to instructions to the contrary signed by all of the Sellers and by the Buyer.

* * *

I find that there were a number of errors in the description of the properties, their income and operating costs in the contract documents. There is no evidence whatsoever of a fraudulent intent on the part of the Gordons, however, and, in fact, Gordon's grant of access to Bordwin was inconsistent with a fraudulent intent. I find that the errors resulted from the size and haphazard recordkeeping of the Gordon operation, and were unintentional. I find that the evidence in no way sustains the allegation of fraud in the counterclaims of Rokowsky, et al.

In early June of 1974, Rokowsky informed the sellers that he could not raise the $16 million in cash required by the February 12 contract and that the deal would have to be restructured. I find, however, that Rokowsky never made any serious effort to raise $16 million, nor did he call on Mr. Freshwater to do so. I find that Rokowsky in fact never intended to pay $16 million in cash, even at the time the contract was executed. His representation to the Gordons that if he could not raise the amount through banks he could get it from Freshwater was a lie. I further find that Rokowsky consistently and continuously lied to the Gordons and subsequently lied to this court concerning his intention to pay $16 million of the purchase price in cash and concerning the availability of cash for that purpose. I find that Rokowsky had intended from the first to wait until the Gordons were firmly committed to the sale, and had incurred considerable expense to consummate it, and then to take advantage of a deteriorating real estate market to renegotiate a deal more favorable to himself and his associates.

In any case, Rokowsky was successful in persuading the sellers to renegotiate the agreements so that the buyers would come up with $6 million cash and give a purchase

money mortgage for $10 million, with a "take-out" provision after three years. A "take-out" is an arrangement by which a financial institution or other financing source would agree to buy the purchase money mortgage for the principal balance remaining after the agreed period.

The sellers were concerned that the new arrangement would not produce sufficient cash to pay anticipated capital gains taxes. They were willing to explore the possibility of converting the sale of the corporately-owned parcels to a sale of corporate stocks, which might alleviate the capital gain impact. For this purpose the closing date of the February 12 agreement was extended to permit the construction of an alternate arrangement. The first extension was to July 8, 1974 and then to July 17, 1974.

On July 16, 1974, Swerdlow, Rokowsky and Breger met with attorneys for the sellers at Swerdlow's office in Great Neck, Long Island. The sellers' lawyers were Stanley Rudman, representing the corporation, Jordan Ring, representing the estate, and Norman Byrnes, a real estate expert engaged to prepare the documents of sale for all the sellers.

Rokowsky and Swerdlow reported that they could not arrange the "take-out" provision and that the sellers would have to take a straight purchase money mortgage. They also asked for an additional extension of time. Rudman and Ring agreed to the new deal, subject to the condition that the $600,000 of deposit money be released so that the Gordon interests could pay real estate taxes. Rokowsky agreed, but required that Robert Gordon and Lola Jacobson give him a negotiable promissory note for $540,000. He demanded the same of the estate for $60,000, but Ring refused, and Rokowsky accepted the personal guarantee of the executrices to repay the money in the event of a default by the estate. Rudman refused on behalf of Robert Gordon

and Lola Jacobson to give a negotiable note but agreed to a nonnegotiable note. The extension of time, the release of the deposit and the grant of the note were made in specific express reliance on Rokowsky's unequivocal statement that he had at that time an absolute commitment for $6 million. This was another lie by Rokowsky.

Rudman testified that at the time of this agreement, he said to Rokowsky, "I will not give a negotiable note for $540,000. On your representation that you have $6 million available, I'll give you a nonnegotiable noninterest bearing note for $540,000 and with a clear understanding that there is no way you're ever going to be paid that $540,000 except as a credit of that note for 540 [sic] against the purchase price pursuant to the termination of our agreement." (Tr. 7-24).[2]

It was also agreed, however, that Rokowsky would be entitled to the $540,000 if the sale did not go through because of the sellers' default. (Tr. 7-27).

This testimony is denied by Rokowsky, who claims in substance that the amount of the note was to be either credited to the purchase price or paid to him if the deal fell through for any reason. I believe Rudman and disbelieve Rokowsky's testimony insofar as it conflicts with Rudman's testimony.

Under date of July 16, 1974, a release of the escrow was executed by Alida Realty, Inc., together with an amendment of the February 12, agreement between the corporate sellers and Alida Realty, Inc. This amendment provided as follows:

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[2] There are two transcripts for the seventh day of trial, each with this pagination. The quoted testimony appears in the transcript of the afternoon session of December 13, 1979.

"1. The date for closing is extended to August 1, 1974.

2. The deposit heretofore held by the escrow agents is to be returned to Edward E. Breger, Esq., attorney for the buyer, and all provisions for escrow set forth in paragraph R are hereby terminated and the deposit shall not serve as a credit to purchasers.

Except as thus amended, said agreement [of February 12, 1974] will remain in full force and effect in accordance with its original terms."

The amendment further recited that it was executed as a sealed instrument.

On July 18, 1974, a promissory note in the amount of $540,000, non-negotiable, without interest and in form unconditional, was executed in Massachusetts by Robert Gordon and Lola Jacobson individually, payable to Isaac Rokowsky individually. $540,000 of the escrow funds was transferred by the escrow holder to Breger, who paid it over to Rokowsky, who in turn paid it out of his own account to Gordon.

The escrow provisions in Paragraph R of the February 12 agreement also contain the limitation of liability relied upon by Swerdlow and Rokowsky. The Gordons now assert that the quoted amendment eliminated the limitation of liability by its purported termination of Paragraph R. (See n. 1, *supra*). Such a result was never discussed or contemplated by the participants at the July 16th conference, and I find that none of the parties intended to eliminate the limitation of liability contained in the original agreement. I find that the quoted amendment was drawn on the spot (and indeed part of it is handwritten), that it is ambiguous in this respect and that its arguable elimination

of the limitation of liability was the inadvertent result of careless draftmanship.

Thereafter, the closing date was further extended by oral agreement to August 28, 1974, and August 26 was set for a rehearsal, at which all of the closing documents would be reviewed and approved for delivery on the 28th.[3] I find that by August 26, Attorney Byrnes had produced all the necessary documents, resolved all the title questions, and either had secured all the necessary releases or was in a position to secure them by August 28th. It is the testimony of Byrnes, Rudman, and to an extent Ring, that on August 26 Rokowsky and Breger appeared at Byrnes' office and advised them that Rokowsky was unable to raise $6 million cash, and that they could not go through with the purchase unless the sellers subordinated their $10 million purchase money mortgage to a $3.5 million bank mortgage. Ring rejected the new proposal on the spot. Rudman left to present this new proposal to Robert Gordon. After discussion with Gordon he made a telephone call to Byrnes' office and told Byrnes that the new proposal was unacceptable and the deal was dead. Byrnes was not positive but testified that it was his best recollection that Rokowsky and Breger were still in his office when the call came in, and that he informed them of Gordon's response.

Rokowsky and Breger relate a totally different version of this meeting. They say they spent about five hours discussing documents, that they informed Byrnes, Rudman and Ring of the necessity of subordinating the purchase money

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[3] The parties contemplated not only the execution of deeds, but the execution of new agreements in substitution for the agreements of February 12. Up to this point, the February 12 agreements were the only written agreements between the parties, and were still in force.

mortgage to a $3.5 million bank loan, and that they left the meeting with the understanding that the three attorneys would consult with their clients and get back to Breger with their response.[4] Rokowsky was impeached so many times and in so many ways during the trial that his credibility was totally destroyed, and I would not accept any disputed testimoney of his. Breger was not directly impeached, and his version of the meeting is supported by a letter which he sent the following day to Byrnes, Rudman and Ring containing the following two paragraphs:

> I am sorry that Stanley [Rudman] was obliged to leave before we completed our discussion. However, in view of the fact that you are submitting the proposal to your respective clients, I am certain that we will be able to reach some accord. We are also discussing the proposal with other sources with a view toward an expeditious closing.

In support of the other view is the uncontested fact that Ring made a formal appearance at Byrnes' office on August 28, 1974 for the purpose of tendering the required deeds. On the same day he wrote Breger and Rokowsky that "the Buyer" (presumably under the February 12 Agreement) was in default. Rokowsky has not challenged this notice of default and has never sought to recover his $60,000 deposit from the estate of Maurice Gordon.

Neither Byrnes nor Rudman replied to Breger's letter of August 27. Robert Gordon did list the properties with a broker immediately after being informed on August 26 that Rokowsky could not go forward with the deal as proposed

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[4] Breger admitted that Ring initially rejected the proposal, but testified that Ring always responded that way to any suggestion, and that he expected Ring to discuss it with his clients.

on July 16. Thereafter he sought to interest other purchasers in the properties and eventually sold them off, most of them to William Kent as trustee for purported Kuwaiti interests.

The lawyers for Gordon also continued sporadically to negotiate with Rokowsky and Breger for the sale of the properties throughout the remainder of 1974 and the first half of 1975. Some of those negotiations did contemplate a subordinated purchase money mortgage along the lines proposed by Rokowsky on August 26. I find that in the deteriorating real estate market of late 1974 and 1975 the Gordons were ready and willing to sell to anyone, including Rokowsky. In their dealings with Rokowsky I find that Rudman and other representatives of the Gordons made it clear that there would be no new deal (or adjustment of the old deal, as the case may be) until Rokowsky could demonstrate that he had actual, enforceable commitments for his financing.

I find that Rokowsky never at any time came up with firm financing of any kind sufficient to enable him to purchase the Gordon properties under any of the arrangements discussed by the parties.

During the sporadic discussions with Rokowsky in late 1974 and early 1975, Gordon sold off several of the real estate parcels included in the February 12 agreement. In mid-1975, Rokowsky apparently faded out of the picture and the sale of the remaining properties to Kent took place in August 1975. The aggregate price received by the Gordon corporations was $4,977,258 and by the Gordon estate $1,491,015 less than the prices established by the two agreements of February 12, 1974.

When he learned of the sale to Kent, Rokowsky brought the instant suit on the $540,000 note. He also brought

a suit in the state court seeking an injunction of the sale to Kent on the ground that he had a right of first refusal as to the properties. The Gordons were forced to pay him $75,000 to clear the record of the lis pendens filed in connection with that suit. Rokowsky admits that the sworn petition in that case contained false statements and his testimony in this case makes it clear that his assertion of a right of first refusal was a sham. (Tr. 2-103 through 2-114).

RULINGS OF LAW

[3-7] 1. In the first case, in which Rokowsky seeks recovery of the $540,000 promissory note, the key legal issue is the application of the parol evidence rule, which in turn depends upon whether the note is an integrated contract. Rokowsky argues that the law of New York applies. I disagree. The note was executed in Massachusetts by Massachusetts residents in aid of protracted negotiations concerning Massachusetts real estate owned by Massachusetts corporations. Furthermore, the note was given in connection with a releasing of escrow and extension of time which was in the form of an amendment to an agreement which provided that the law of Massachusetts would apply. In a diversity case, we are to apply the conflicts rule which is most likely to be applied by the Supreme Judicial Court of Massachusetts on similar facts. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Under Massachusetts law, the parties, choice of law will be given effect if it bears a reasonable relationship to the transaction and does not violate public policy. *Steranko* v. *Inforex, Inc.*, 5 Mass.App. 253, 362 N.E.2d 222 (1977). The two documents represented the several aspects of a single transaction, and it would be absurd to have them governed by different law. Further-

more, the law applicable to a note is the law of the place where the note is payable. *Walling* v. *Cushman,* 238 Mass. 62, 65, 130 N.E. 175 (1921). A demand note is payable at the place of residence of the maker if no place of payment is named in the note. 11 *Am.Jur.*2d, Bills and Notes § 89. Under all of these circumstances, the law of Massachusetts clearly governs.

[8, 9] Under Massachusetts law, whether a writing constitues an integrated contract is a question of the intention of the parties. *Caputo* v. *Continental Construction Corp.,* 340 Mass. 15, 18, 162 N.E.2d 813, 816 (1959). This is a preliminary question of fact for the court. *Carlo Bianchi & Co., Inc.* v. *Builders' Equipment & Supplies Co.,* 347 Mass. 636, 643, 199 N.E.2d 519, 524 (1964). A writing which appears on its face to be complete is presumed to be an integrated contract, in the absence of contrary evidence. *Robert Industries, Inc.* v. *Spence,* 362 Mass. 751, 754, 291 N.E.2d 407, 409 (1973).

[10] The same principle applies to promissory notes. *Trustees of Tufts College* v. *Parlane Sportswear Co. Inc.,* 4 Mass.App. 783, 342 N.E.2d 727, 728 (1976), citing *Robert Industries, Inc.* v. *Spence, supra.*

[11] The note in this case represents but one aspect of a complex transaction. It is clear from all of the contemporary and subsequent drafts of contract amendments that the note was part of a restructuring of the deposit arrangement, exacted as a condition of present use of the deposit by the sellers. It was contemplated by all the parties that the note would be satisfied by a credit at the closing unless the deal fell through, an understanding that does not appear on the face of the instrument, and is inconsistent with its "demand" provision.

I find and rule that the promissory note dated July 18, 1974 was not an integrated contract. Consequently, the parol evidence rule does not apply, and the note is subject to the oral conditions imposed at the conference on July 16, 1974 between Rudman and Rokowsky, namely, that the note would be paid only (1) by way of a credit against purchase price at a closing of the real estate agreement or (2) in the event of a default by the Gordons. Since neither of these conditions were fulfilled, Rokowsky is not entitled to payment of the note. Accordingly, judgment shall be entered for the defendant in the first case (CA #78-3316-S), with costs.

[12] 2. In the second and third cases, Robert Gordon and Lola Jacobson, as assignees of the original selling corporations, and Dorothy Gordon and Lola Jacobson, executrices of the estate of Maurice Gordon seek damages for breach of contract. Rokowsky, Swerdlow and Alida Realty, Inc., who are the defendants, claim that the two agreements of February 12, were abandoned by both parties. I find and rule, however, that performance under those agreements was conditionally waived by the Gordons, subject to the condition that parties execute and perform a substitute agreement. This conclusion is supported by the recitation in the July 16 release of escrow and purported deletion of Paragraph R that the February 12 agreement otherwise remain in full force and effect.

As to the claim of the executrices, the resolution of the issues is relatively simple. When the time agreed for performance, August 28, 1974, arrived, Mr. Ring tendered performance on behalf of the estate. The purchasers neither tendered performance nor satisfied the condition upon which performance had been waived. Mr. Ring immediately notified them that they were in default. I rule that the de-

fendants were in default as of August 28, 1974, and that all further negotiations between the estate and Rokowsky looked toward a new agreement and not a revival of the old one.

The position of Robert Gordon and Lola Jacobson as successors to the corporate sellers is less clear. The defendants in this case, the purchasers, argue that there was an unequivocal notice of default such as to put them in default as of August 28, 1974, and under the various negotiated extensions of time, time was not of the essence.

Those considerations would be important in determining whether the purchasers were in default *as of August 28, 1974,* and that in turn would be an important question if the purchasers had tendered performance at some later date and been refused. In this case, however, the purchasers never secured the financing to perform under the original agreement of February 12, the proposed modification of June 1974, the further proposed modification of July 16, 1974, or even under any of the arrangements subsequently discussed. I find and rule that the sellers' waiver of performance under the February 12 agreement, to the extent that it continued after August 28, 1974, continued to be conditioned on the execution and performance of a mutually satisfactory substituted agreement either by August 28, 1974 or within a reasonable time thereafter. I rule that completion of the deal within a reasonable time was implicit, and that a reasonable time had clearly expired by the summer of 1975. In view of the purchasers' ultimate breach of contract, there is no need for me to decide the difficult question of whether the purchasers were in default on August 28, 1974.

[13] Defendants claim that they cannot be held in default and held liable for breach of the corporate agreements of

February 12, 1974, because the sellers were not ready at any time to perform in accordance with those agreements. This is true, and ordinarily one party may not hold the other in default unless it is ready to perform. The sellers, however, with considerable effort, had made themselves ready to perform according to the proposed amendments to the agreements negotiated on July 16. This was done at the instance of the purchasers, who had failed to produce the purchase price as originally agreed. Not only was the altered performance prepared at the request of the purchasers, it was done in reliance on Rokowsky's out and out flat lie to Rudman that the $6 million cash payment was actually available. Under these circumstances, to permit the purchasers to take advantage of the fact that the profered performance of the sellers was not in accordance with the original contract would be unconscionable, and a gross misapplication of the rule.

Notwithstanding all of the foregoing, the plaintiffs in the two cases, the two groups of sellers, are not entitled to recover damages for breach of contract. I have found that the document of July 16, 1974 releasing the escrow was not effective to eliminate the provision for liquidated damages. I find and rule that the transfer of funds to the sellers on or about July 18, 1974 was an advance of the funds theretofore segregated as liquidated damages, and was not intended to be an additional penalty. The plaintiffs have therefore received everything to which they are entitled, and judgment will be entered for the defendants on Count 1 in C.A. 3259-S and Count 1 in C.A. 3260-S.

Because of the reprehensible conduct of Rokowsky in conducing the negotiations and his lack of candor at trial, the defendants shall not recover their costs. Fed.R.Civ.P. 54(d).

3. The facts found on page 1118, *supra*, require the dismissal of the defendants' counterclaims in cases C.A. 3259-S and 3260-S.

[14] 4. During the trial, the plaintiffs in the second and third cases moved to amend their complaints to add a second count for fraud in the inducement of the agreement of February 12, 1974. A late amendment to conform to the evidence is permissible under the Fed.R.Civ.P. 15(b), and there is ample evidence of fraud in Rokowsky's false statements concerning his present intention to pay $16 million in cash and his capacity to raise such a sum.

Accordingly, the motions to amend the complaints in the second and third case are ALLOWED.

[15] The measure of damages for misrepresentation (even in the absence of proof of intent to deceive) is the benefit of the bargain which the plaintiffs would have had if the representation had been true. *Robichaud* v. *Athol Credit Union*, 352 Mass. 351, 225 N.E.2d 347 (1967). In this case the damages are reduced by the eventual sales of the properties to others, and are in effect the same as the contract damages. As stated in the findings of fact the damages to Robert Gordon and Lola H. Jacobson, as successors to the Gordon corporation, are $4,977,258, and the damages to Dorothy Gordon and Lola H. Jacobson as executrices of the Estate of Maurice Gordon are $1,491,015.

It does not appear that Swerdlow made any of the false representations concerning the financing, or that he knew that they were false. Alida Realty, Inc. was a cipher in this whole transaction. It was Rokowsky's device rather than Rokowsky's principal. Accordingly, judgment shall enter for the defendants, Alida Realty, Inc. and Swerdlow on Count 2 in cases No. C.A. 3259-S and C.A. 3260-S, without

costs. Judgment shall enter for the plaintiffs against Isaac Rokowsky on Count 2 in the amount of $4,977,258 in case No. C.A. 3259-S and in the amount of $1,491,015 in case No. C.A. 3260-S, with interest from June 28, 1974 and costs in each case.

District Court's Opinion Denying Motion for New Trial [531 F. Supp. 435]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civ. A. Nos. 78-3316-S, 78-3259-S and 78-3260-S.

ISAAC ROKOWSKY, *et al.*,

Plaintiffs,

v.

ROBERT GORDON, *et al.*,

Defendants.

January 18, 1982

Barry I. Fredericks, Goldschmidt, Fredericks, Kurzman Oshatz, Lewis A. Kaplan, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for plaintiffs.

Arthur M. Gilman and David G. Hanrahan, Gilman, McLaughlin & Hanrahan, Boston, Mass., for defendants.

MEMORANDUM ON MOTION FOR NEW TRIAL AND OTHER RELIEF

SKINNER, District Judge.

These three consolidated cases arise out of an aborted agreement to sell commercial real estate in Massachusetts. In the first case, Rokowsky, one of the prospective purchasers, seeks to recover on a promissory note in the amount of $540,000 issued in the course of the deterioration of the transaction. In the second and third cases, Robert Gordon

and his sister Lola H. Jacobson, owners of the beneficial interest in 26 of the 28 parcels to be sold, and the executrices of the estate of Maurice Gordon, which owned the other two parcels, claim damages for breach of contract against Alida Realty, Inc., the nominal purchasers, and its disclosed principals Isaac Rokowsky and Michael Swerdlow. By amendment, they also seek damages for fraud in the inducement of the agreement.

The motions to amend the complaint in the second and third cases were originally made on the sixth day of the nonjury trial. I denied them without prejudice. They were thereafter renewed at the close of the trial, and I took them under advisement. After reviewing the transcript of the trial, I determined that the issue of fraud in the inducement had been fully tried and allowed the motions to amend under Fed.R.Civ.P.15(b). I then found for the plaintiff (the Gordons) on the added count in the aggregate of $6,468,273 against the defendant Rokowsky with interest from June 28, 1974.[1] 501 F.Supp. 1114 (1980).

Rokowsky now moves for a new trial in the second and third cases on four grounds:

1. The amendment deprived him of his right to a jury trial under the Seventh Amendment to the Constitution.
2. The amendment was not proper under Fed.R.Civ.P. 15(b).
3. An incorrect measure of damages was employed.
4. Interest on the award should not be allowed.

1. *Right to Jury Trial.*

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[1] I found for the defendants (the Gordons) in the first case.

[1] In my opinion, the jury trial issue is subsumed under the issue of "express or implied consent", the prerequisite for a post-trial amendment under Fed.R.Civ.P. 15(b). If the defendant expressly or impliedly gave his consent to the trial of the issue of fraud in the inducement, it was in the trial then going forward, that is, a nonjury trial. Both sides had waived a jury before trial and never mentioned a jury again until this present motion was filed. Accordingly, I reject the constitutional issue of trial by jury as a separate ground for a new trial and shall consider only the question of express or implied consent.

2. *Propriety of the Amendment Under Fed.R.Civ.P. 15(b).*

[2] The test of consent to the trial of an issue appears to be whether a party permitted the introduction of evidence, without objection, or himself introduced evidence, which was relevant only to that issue. *Marston* v. *American Employers Insurance Co.*, 439 F.2d 1035, 1042 (1st Cir., 1971); *cf. Vargas* v. *McNamara*, 608 F.2d 15, 18 n.3 (1st Cir., 1979).

[3] The particular issue was this: did Rokowsky enter into an agreement to buy real estate for $16 million cash plus assumption of existing mortgages at a time when he never intended to carry out the agreement, but intended from the very beginning to "negotiate" it down so that he need not provide any cash. There was considerable testimony, introduced by Rokowsky, concerning his ability to come up with the money, and the availability of cash from his backer, Mr. Freshwater. Most of this testimony revealed the fact that neither he nor Freshwater ever had the capacity to raise $16 million, that Rokowsky never made a serious effort to do so, and that he proceeded to try to renegotiate

the contract very soon after it was executed. Arguably, most of that evidence was relevant to other issues.

There were two instances of evidence, however, one introduced without objection and one introduced by Rokowsky's own lawyer, which clearly related to the added issue and no other, and make it clear that much of the other evidence was understood by the parties to bear on this point. The first occurred during the cross-examination of Rokowsky by Atty. Gilman, counsel for the Gordons, at T. 3-48, 49.

> Q. Now, as a matter of fact, your plan from the very beginning was never to come up with any cash at all of your own or Freshwater's, isn't that so? Can you answer that question?
>
> A. No, that's not so.
>
> Q. It's not so. And, in fact, sir—
>
> A. I could come up with 600. [the $600,000 deposit under the purchase and sale agreement]

It was a plain inference from this response that Rokowsky from the beginning intended the deposit to be his only contribution of cash.

The second occurred during the cross-examination of Robert Gordon by Attorney Suzman, one of Rokowsky's lawyers at T. 9-162, 163:

> Q. And you testified this morning, you believed that Mr. Rokowsky was going to be able to come up with the money?
>
> A. Yes.
>
> Q. And you testified that you were told by Ryan Elliott that they had checked out Mr. Rokowsky?
>
> A. Well, I don't know if I used the word "checked out".

> Q. What did Ryan Elliott tell you?
>
> A. Ryan Elliott were the brokers who brought us together, and based upon information that we received from Ryan Elliott sources, from attorneys, and from Mr. Swerdlow, Mr. Rokowsky, themselves, who they were, what business, how large they were, et cetera, I surely did believe they could come up with the money, because, I took this property off the market for over a year and tied everything up, based upon the fact they would come up with the money.
>
> Q. What did Ryan Elliott tell you?
>
> A. I don't remember.
>
> Q. You don't recall, as we sit here today, what they told you?
>
> A. Specifically, no.

This would appear on the face of it to have relevance only to the issue of reliance, and to suggest very strongly that Rokowsky's attorneys were aware that the fraud issue had been introduced into the case. In particular, Mr. Gordon's statement about taking the property off the market in reliance on Rokowsky's representations was not challenged, although it was clearly unresponsive.

Later on, however, the following colloquy occurs, on which Rokowsky apparently relies to explain the foregoing, at T. 9-164, 165:

> A. I didn't ask them where they got the money from. I mean, I was told—It would be kind of absurd for me to think otherwise. I entered into a deal with individuals, of course thinking they had the money to go through with the deal.
>
> Q. Thinking it. I'm trying to find out whether you took any steps to check them out?

A. Yes.

Mr. Gilman: I'm going to object to this line of questioning.

The Court: What relevance does that have?

Mr. Suzman: Let me go on with it, your Honor.

The Court: If you what?

Mr. Suzman: If you permit me to go on with it?

The Court: No, tell me why.

Mr. Suzman: The question of who he was dealing with which is one of the issues in this case.

The Court: I didn't think there was any question about who he was dealing with. He was dealing with Rokowsky and Swerdlow.

Mr. Suzman: I don't know that for a fact.

Notwithstanding the last colloquy, I am persuaded on a second review of the transcript, as I was on the first, that the issue of Rokowsky's fraudulent representation was in fact fully tried and inferentially recognized as an issue in the case by Rokowsky's attorneys.

The next inquiry concerns prejudice to the defendant because of the late allowance of the amendment. Rokowsky's attorney alleges two instances of prejudice:

First, he says that if he had known that the issue of fraud in the inducement were to be brought into the case, he would have introduced a release given by the Gordons to Rokowsky in connection with a parallel case in the state court (described at 501 F.Supp. 1121). The release is not a general release, however. The releasing language is as follows:

3. RG, LJ and the Corporations hereby waive and relinquish any claim or right which they or each

> of them may have against IR or William F. Cowin or the firm of Friedman & Atherton for the bringing of the said suit or the filing of Lis Pendens in connection therewith including without limitation any claims for abuse or process or for malicious prosecution or otherwise.

Rokowsky submits an affidavit by his lawyer that the Gordons intended to give a general release by this document. Even if he were a competent witness, the release is not ambiguous and his testimony would not be allowed. The words "or otherwise" clearly refer to claims "for the bringing of said suit or the filing of *lis pendens*". This release would have availed him nothing in the present case.[2]

Second, Rokowsky claims that he would have conducted further discovery on the subject of the Gordons' reliance on Rokowsky's statements. In support of this assertion, he offers the transcript of a deposition of Attorney Ring in which Ring describes Robert Gordon during the contract negotiations as stating that Rokowsky was a phony and would never come up with the money. As pointed out, that line of inquiry was in fact pursued at trial. The overwhelming fact is that Gordon did indeed execute the purchase and sale contract by which he withdrew real estate worth over $30 million from the market for four months, later extended an additional two months. It is not uncommon for a contractor to enter into a contract with doubts as to the other contracting party's capacity to perform. It strains belief, however, to assert that Gordon would have executed the contract if he had known that Rokowsky

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2 Furthermore, if it was a general release, it would have been a complete defense in the contract action against Rokowsky personally. The attorney's claim that he was relying on the shield of the dummy corporation is not in the least credible.

never intended to perform his end of the bargain. The fact of Gordon's execution of the contract raises a monumental presumption of reliance. There is, in my opinion, no substantial likelihood that it could have been overcome.

Accordingly, I find the assertions of prejudice to Rokowsky to be insubstantial, and no basis for denying the motions to amend or to grant a new trial on the issue of liability.

3. *Measure of Damages.*

Rokowsky attacks the award on two grounds: first, that the wrong measure of damages was used, and second, that the measure of damages was wrongly applied. The second issue being the simplest, I shall address it first. The measure of damages which I used was the Gordons' loss of the benefit of their bargain. I took the difference between the contract price and the price at which the Gordons eventually sold the property as representing the dollar value of damages. The eventual sale was in the summer of 1975. Rokowsky says the true measure is the difference between the contract price and the market value of the property in the fall of 1974 when Rokowsky failed to perform either the original or the proposed substitute purchase and sale agreement.

[4] Rokowsky is correct in this respect but in fact the eventual sale in 1975 is a measure of the value of the property in the fall of 1974 which is most favorable to Rokowsky. I have found that the Gordons were actively trying to sell the property from August 26, 1974 on. If there had been a market for the property at any better price than they sold it for in 1975, they would have sold it at that price. I conclude that there was no market in the fall of 1975 any higher than the price at which the property was

sold in 1975. It may well be that there was no market at all in 1974, in which case Rokowsky has had the advantage of the 1975 figure. I conclude that if loss of the benefit of the bargain was the proper measure of damages, the measure of damages was properly applied.

[5] The general rule of damages in fraud cases under Massachusetts law is that the plaintiff is entitled to recover the benefit of his bargain. *Robichaud* v. *Athol Credit Union,* 352 Mass. 351, 225 N.E.2d 347 (1967). The defendant is correct in asserting that the rule may be varied in order to achieve a more just result. *Rice* v. *Price,* 340 Mass. 502, 164 N.E.2d 891 (1960). The cited case does not stand for the proposition, however, that it is ever error to apply the general rule. It is true that at one of the hearings in this case I stated that I would prefer to impose damages based on opportunity costs plus out-of-pocket expense, and so I would. It is also true that the benefit of the bargain rule produces a very large award which may not be the economic equivalent of the actual loss created by the defendant's fraud. On reflection, however, I conclude that opportunity cost could be developed only on evidence of the existence of an alternate market for the 28 commercial buildings involved in this case during the period February-August, 1974. Such a collection of real estate is rarely offered in wholesale lots, and reliable evidence of an alternate market or the lack of it would be difficult, if not impossible, to establish. As I read the Massachusetts cases, there is little justification for substituting such a speculative measure of damages for the reasonably certain one of loss of the benefit of the bargain.

If, as defendant suggests, however, there is some resolution of this matter which would lead to settlement of this controversy, I would be glad to confer with counsel and

listen to any suggestions. In the meantime, my award of damages stands.

4. *Interest on the Award.*

[6] After urging upon me a Massachusetts rule of damages ,the defendant argues that the law of Florida should apply with respect to interest on the award. I will not belabor the anomaly of this position. In any case, I have treated the entire case as being governed by the law of Massachusetts, and I shall do the same with regard to interest. The award of interest contained in my order of November 19, 1980 is erroneous. The true rule in Massachusetts is that in actions for deceit, and indeed in all tort actions other than those enumerated in M.G.L. c. 231, § 6B, interest runs from the time that damages are liquidated by award or verdict. *Connelly* v. *Fellsway Motor Mart, Inc.*, 270 Mass. 386, 170 N.E. 467 (1930); M.G.L. c. 235, § 8. Accordingly, interest shall run on the award only from November 19, 1980.

5. *Conclusion.*

The order for judgment of November 19, 1980 is amended to provide that interest shall run from November 19, 1980 rather than June 28, 1974, and the judgments entered December 1, 1980 shall be amended accordingly. The Motion for New Trial and Other Relief is otherwise DENIED.

First Circuit's Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 81-1021

ISAAC ROKOWSKY,

Plaintiff, Appellant,

v.

ROBERT GORDON, *et al.*,

Defendants, Appellees.

No. 82-1106

ROBERT GORDON, *et al.*,

Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,

Defendants, Appellees.

ISAAC ROKOWSKY,

Defendant, Appellant.

No. 82-1107

ROBERT GORDON, *et al.*,

Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,

Defendants, Appellees.

First Circuit's Judgment

ISAAC ROKOWSKY,
Defendant, Appellant.

No. 82-1186
LOIS JACOBSON, *et al.*,
Plaintiffs, Appellees,
v.
ALIDA REALTY, INC., *et al.*,
Defendants, Appellees.

ISAAC ROKOWSKY,
Defendant, Appellant.

ROBERT GORDON, *et al.*,
Plaintiffs, Appellees,
v.
ALIDA REALTY, INC., *et al.*,
Defendants, Appellees.

ISAAC ROKOWSKY,
Defendant, Appellant.

JUDGMENT

Entered January 27, 1983

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgments of the District Court as modified by the opinion of this Court filed this day are affirmed.

Costs to appellees.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Kaplan & Gilman.]

District Court's Amended Judgments

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 78-3259-S

ROBERT GORDON and LOLA JACOBSON,

Plaintiffs,

v.

ALIDA REALTY, INC., BENJAMIN FRESHWATER, ISAAC ROKOWSKY and MICHAEL SWERDLOW,

Defendants.

This action came on for trial before the Court, Honorable Walter Jay Skinner, District Judge presiding, and a decision having been duly rendered, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1) Judgment is awarded Plaintiffs in the amount of $4,977,258 against the Defendant, Isaac Rokowsky, plus $580,680.10 representing interest at the rate of ten (10) percent per annum from November 19, 1980 as provided by law, and their costs of action on Count II.

2) Judgment for Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow on Count I, without costs.

3) The counterclaims of the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow be and the same are hereby dismissed.

/s/ PHILIP J. LYONS
Deputy Clerk

Dated: January 21, 1982

District Court's Amended Judgments

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 78-3260-S

DOROTHY GORDON and LOLA H. JACOBSON, CO-EXECUTRICES OF THE ESTATE OF MAURICE GORDON,
Plaintiffs,

v.

ALIDA REALTY, INC., ISAAC ROKOWSKY and MICHAEL SWERDLOW,
Defendants.

This action came on for trial before Court, Honorable Walter Jay Skinner, District Judge presiding, and a decision having been duly rendered, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1) Judgment is awarded plaintiffs in the amount of $1,491,015 against the Defendant, Isaac Rokowsky, plus $173,951.00 representing interest at the rate of ten (10) percent per annum from November 19, 1980, as provided by law, and their costs of action on Count II.

2) Judgment for the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow on Count I, without costs.

3) The counterclaims of the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow be and the same are hereby dismissed.

/s/ PHILIP J. LYONS
Deputy Clerk

Dated: January 21, 1982

District Court's Original Judgments

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 78-3259-S

ROBERT GORDON and LOLA JACOBSON,
Plaintiffs,

v.

ALIDA REALTY, INC., BENJAMIN FRESHWATER, ISAAC ROKOWSKY and MICHAEL SWERDLOW,
Defendants.

This action came on for trial before the Court, Honorable Walter Jay Skinner, District Judge, presiding and a decision having been duly rendered, it is hereby.

ORDERED, ADJUDGED AND DECREED that:

1) Judgement in the amount of $4,977,258 against the Defendant, Isaac Rokowsky, together with interest at the rate of eight (8) percent per annum until September 17, 1980 and thereafter at the rate of ten (10) percent per annum as provided by law, and their costs of action on Count II.

2) Judgement for the Defendants, Alida Realty, Inc., and Michael Swerdlow on Count II, without costs.

3) Judgement for the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow on Count I, without costs.

4) The counterclaims of the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow be and the same are hereby dismissed.

Dated: December 1, 1980

District Court's Original Judgments

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 78-3260-S

DOROTHY GORDON and LOLA H. JACOBSON,
CO-EXECUTRICES OF THE ESTATE OF MAURICE GORDON,
Plaintiffs,

v.

ALIDA REALTY, INC., ISAAC ROKOWSKY and
MICHAEL SWERDLOW,
Defendants.

This action came on for trial before the Court, Honorable Walter Jay Skinner, District Judge, presiding and a decision having been duly rendered, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1) Judgement in the amount of $1,491,015 against the Defendant, Isaac Rokowsky, together with interest at the rate of eight (8) percent per annum until September 17, 1980 and thereafter at the rate of ten (10) percent per annum as provided by law, and their costs of action on Count II.

2) Judgement for the Defendants, Alida Realty, Inc., and Michael Swerdlow on Count II, without costs.

3) Judgement for the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow on Count I, without costs.

4) The counterclaims of the Defendants, Alida Realty, Inc., Isaac Rokowsky and Michael Swerdlow be and the same are hereby dismissed.

Dated: December 1, 1980

First Circuit's Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 81-1021

ISAAC ROKOWSKY,

Plaintiff-Appellant,

v.

ROBERT GORDON, *et al.*,

Defendants, Appellees.

No. 82-1106

ROBERT GORDON, *et al.*,

Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,

Defendants, Appellees.

ISAAC ROKOWSKY,

Defendant, Appellant.

No. 82-1107

ROBERT GORDON, *et al.*,

Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,

Defendants, Appellees.

First Circuit's Order Denying Rehearing

No. 82-1186

LOIS JACOBSON, *et al.*,
Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,
Defendants, Appellees.

ISAAC ROKOWSKY,
Defendant, Appellant.

No. 82-1187

ROBERT GORDON, *et al.*,
Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,
Defendants, Appellees.

ISAAC ROKOWSKY,
Defendant, Appellant.

Before:

COFFIN, Chief Judge,
ALDRICH, SWYGERT*, CAMPBELL, BOWNES and BREYER, Circuit Judges.

ORDER OF COURT

Entered February 28, 1983

Upon consideration of the "Petition for Rehearing and Suggestion for Rehearing en Banc", which document was

submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said suggestion for hearing en banc is hereby denied.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Gilman, Kaplan & Hanrahan.]

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* Of the Seventh Circuit, sitting by designation.

First Circuit's Order & Opinion Staying the Mandate [Unpublished]

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 81-1021

ISAAC ROKOWSKY,
Plaintiff, Appellant,

v.

ROBERT GORDON, *et al.*,
Defendants, Appellees.

Nos. 82-1106, 82-1107 and 82-1187

ROBERT GORDON, *et al.*,
Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,
Defendants, Appellees.

ISAAC ROKOWSKY,
Defendant, Appellant.

No. 82-1186

LOIS JACOBSON, *et al.*,
Plaintiffs, Appellees,

v.

ALIDA REALTY, INC., *et al.*,
Defendants, Appellees.

ISAAC ROKOWSKY,
Defendant, Appellant.

First Circuit's Order & Opinion Staying the Mandate

ORDER ON MOTION FOR ORDER STAYING MANDATE

MEMORANDUM AND ORDER

Entered: March 4, 1983

The court grants the motion to stay mandate, inasmuch as it is assented to, but, since it wrote no opinion on the motion for rehearing, it feels called upon to make a brief response to paragraph 5 of counsel's affidavit, filed in support of the motion, on the assumption that petitioner may later see fit to repeat some of its underlying allegations as made in the petition for rehearing.

(1) Petitioner alleged in that petition,

> ". . . the only claims asserted against Mr. Rokowsky were for breach of contracts to buy real estate."

This is a flat misstatement; the Gordons also alleged, at the start, fraud in the inducement of the renegotiated contracts. (Rokowsky's asserted access to $6 million).

(2) In the petition for rehearing petitioner asked why he should accuse himself of fraud.

Petitioner's counsel asked the district court the same question, and the court replied, "[Y]ou tried to pull yourself out of the hole with some additional aspects of fraudulent conduct." What this meant was that petitioner, finding himself in serious trouble with respect to the $6 million, sought to show he originally had the $16 million as represented, but lost it, due to shrinking real estate market. This, too, proved to be false. The court warrantably found

that fraud in respect to both sets of contracts had beco
at issue.

(3) In the petition for rehearing petitioner asserted
had been "tried by ambush;" a contention now phrased
paragraph 5(a) of the motion, " . . . the newly-added cla
[was] without prior notice."

In point of fact, when the motion to add the issue
fraud in respect to the original contract was made n
trial, the court, in denying it without prejudice, stated

> "At the closing of this case I won't preclude y
> from raising it again."

Surely this was full warning.

(4) Petitioner says in paragraph 5(a) of his moti
that he was denied "opportunity to be heard."

In fact, at the close of the case, when the motion
amend was renewed, the court said to Rokowsky's couns
with reference to the $16 million,

> "I think that the whole area of whether he h
> the money, and when he had the money, w
> addressed by you in your principal case.
>
> " . . . What would you have discovered that y
> didn't discover? You have climbed up one s
> and down the other in every aspect of this cas

To this counsel offered no substantive reply.

By the Court:

/s/ DANA H. GALLUP
Cle

No. 82-1735.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

ISAAC ROKOWSKY,
PETITIONER,

v.

ROBERT GORDON, LOLA JACOBSON AND
LOLA JACOBSON, AS EXECUTRIX OF THE ESTATE OF
MAURICE GORDON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

DAVID G. HANRAHAN,*
ARTHUR M. GILMAN,
MICHAEL EBY,
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Boston, Massachusetts 02109.
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* *Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

As the respondents set out more fully in the following statement of the case, the petitioner has misstated the facts in his formulation of the questions presented. The trial was not solely "breach of contract actions," but from its inception included fraud claims.

Also, petitioner attempts to create the impression that he intentionally withheld evidence in reliance on the court's denial of the motion to amend under Fed.R.Civ.P. 15(b) without prejudice. However, when given the opportunity on numerous occasions to demonstrate what additional evidence he would have adduced he utterly failed to do so. In fact, the district court found his assertions of prejudice to be insubstantial.

Finally, contrary to petitioner's claim that he objected to the assertion of the new issue at every opportunity, he injected the new issue, admitted his fradulent conduct, failed to object to evidence on the new issue and actively participated in direct and cross-examination on the new issue both before and after the motion to amend was first raised.

In these circumstances, there are simply no questions fairly presented for this Court's review. However, the issues which we address in this brief are:

1. Where a party opens and injects a new issue, not incidentally or as a collateral matter, directly and fully litigates it, and fails to demonstrate undue or material prejudice, the allowance of a Rule 15(b) motion is not an abuse of discretion.

2. Where these circumstances arise in the context of a jury-waived trial, petitioner is neither denied a right to trial by jury or deprived of his right to due process of law.

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No. 82-1735.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

ISAAC ROKOWSKY,
PETITIONER,

v.

ROBERT GORDON, LOLA JACOBSON AND
LOLA JACOBSON, AS EXECUTRIX OF THE ESTATE OF
MAURICE GORDON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

Statement of the Case.

The Facts.

In early 1974, Rokowsky was negotiating a contract with the respondents to purchase twenty-eight office buildings in downtown Boston, owned or controlled by respondents herein, for a price of $42 million, to be comprised of $6 million to be paid in cash, by assumption of an existing $20 million mort-

gage and a $16 million purchase money mortgage to be taken back by the respondents (A. 3a). Because the respondents objected to taking back a purchase money mortgage, the price was reduced to $38 million, to be comprised of $16 million in cash and the assumption of the $22 million balance of existing first mortgages (A. 3a). The petitioner represented to the respondents that he had $16 million and that it was coming from a wealthy British investor, by the name of Freshwater (A. 4a). The respondents believed this representation, and, in reliance thereon, removed the twenty-eight office buildings from the market (A. 36a).

The contract for a purchase price of $38 million was executed in February, 1974 with a closing scheduled for June, 1974. Thereafter, as the district court found:

> In early June of 1974, Rokowsky informed the sellers that he could not raise the $16 million in cash required by the February 12 contract and that the deal would have to be restructured. I find that Rokowsky in fact never intended to pay $16 million in cash, even at the time the contract was executed. His representation to the Gordons that if he could not raise the amount through banks he could get it from Freshwater was a lie. I further find that Rokowsky consistently and continuously lied to the Gordons and subsequently lied to this court concerning his intention to pay $16 million of the purchase price in cash and concerning the availability of cash for that purpose. I find that Rokowsky had intended from the first to wait until the Gordons were firmly committed to the sale, and had incurred considerable expense to consummate it, and then to take advantage of a deteriorating real estate market to renegotiate a deal more favorable to himself and his associates.

Pursuant to his fraudulent scheme, in June, 1974, and frequently thereafter, Rokowsky falsely stated that Freshwater would provide him with $6 million in cash provided that the Gordons took back a purchase money mortgage for the $10 million balance (A. 4a). It should be noted that the respondents had surrendered $4 million at the outset to avoid any purchase money mortgage (A. 4a).

Relying on Rokowsky's statement that he had the $6 million, the respondents agreed to revise the contract by taking back a $10 million purchase money mortgage subject to the release of the deposit which was needed to pay real estate taxes. For this, Rokowsky received a non-negotiable promissory note. Thereafter Rokowsky stated he did not have the $6 million available and requested a further modification of the cash purchase price. The petitioner was never able to close the transaction in any modified form. Later, the Gordons found a new purchaser but at a reduction in the purchase price of $6,468,723 (A. 4a).

Pretrial.

Contrary to petitioner's contention, the pre-trial issues were not limited to a claim of breach of contract to buy real estate. The pre-trial orders clearly raised the question of petitioner's fraudulent inducements of the renegotiated contracts, *i.e.*, Rokowsky's assertion that, although he could not get $16 million from Freshwater, he would have $6 million (A. 51a).

The Trial.

The circuit court's summary of the trial testimony leading to the motion to amend pursuant to Rule 15(b) is as follows:

> No question was raised with respect to the $16 million commitment. However, during trial, Rokowsky himself

constantly asserted it, possibly in connection with his concession that from the start he sought to renegotiate the contract by telling untruths. When this unabashed conduct ultimately induced the court to voice its surprise, counsel responded,

> "It is our position, it is perfectly sound business practice and prevalent in the area from which my client comes to negotiate a contract to the very last moment."

For reasons of his own, Rokowsky contended that this was not inconsistent with the $16 million commitment. In his main brief he stated that the purpose of this profession was an attempt to "harmonize his renegotiation efforts with his contention that he had a commitment from Freshwater by explaining that he felt under a duty to minimize the amount of cash necessary to close the transaction . . . notwithstanding the Freshwater commitment." In this it would appear that he was fleeing from a charge that had never been made.

Rokowsky's admitted practice, amply supported by the evidence, was that once the contract was made, with a small deposit, the buyer, rather than stopping at the contract, continues to negotiate the seller into a corner; cost, nothing, so long as it works; nothing more than the deposit if it does not work, and even then, as this case demonstrates, the buyer may seek to recover the deposit. The reason for this conduct, Rokowsky explained, is that it is always to the buyer's advantage to negotiate down and keep the sellers involved in the properties, viz., as purchase money mortgagees, reducing the agreed cash payment as much as possible.

While Rokowsky's logic, as distinguished from his ethics, may have been sound, we consider it was not unreasonable for the court to combine this admitted con-

> duct with the fact of no semblance or prospect of a commitment to begin with and conclude that there were misrepresentations as to ability and intent to perform, both material matters as constituting fraud in the inducement.
>
> Whatever may have been the purpose of Rokowsky's opening the issue of the contract's initiation and the $16 million commitment, the fact is he did, not incidentally and collaterally, but as a direct and fully litigated matter.

(A. 5a-6a) (footnote omitted).

Rokowsky's injection of the issue and his admission noted above prompted respondents' attorneys to move to amend the pleadings under Rule 15(b) to conform the pleadings to the proof of fraud in the inducement of the original contract which was, by then, already in the case. This was on the sixth day.

The trial court denied the motion at that time without prejudice and stated "at the closing of this case, I won't preclude you from raising it again" (A. 52a).

Notwithstanding petitioner's objection to the allowance of the motion, counsel for both parties continued to interrogate witnesses on Rokowsky's precontract representations, his intent and the respondents' reliance. Petitioner failed to object to such evidence being introduced or to move to strike or limit such evidence (A. 6a, 7a, 32a-36a).

At the conclusion of the trial, respondents reinstated their motion to amend under Rule 15(b). The court heard argument from both sides and notified counsel that it was taking the matter under advisement. Despite petitioner's belated contention below and in his petition to this Court that he was denied an opportunity to be heard, it is clear that the trial judge notified him at the conclusion of the case that:

> I think that the whole area of whether he had the money, and when he had the money, was addressed by you in your principal case.
>
> . . . What would you have discovered that you didn't discover? You have climbed up one side and down the other in every aspect of this case.

(A. 9a, 52a.)
Not only did petitioner's counsel not offer any substantive reply, but he said nothing on the issue for the eleven months between the trial's conclusion and the court's decision (A. 9a).

The District Court's Decision.

In light of the ample evidence of fraud introduced by petitioner concerning his false statements regarding his present intention to pay $16 million in cash and his capacity to raise that sum, the district court permitted the respondents' amendment in order to conform to the evidence under Federal Rules of Civil Procedure 15(b) (A. 28a).

Postjudgment Proceedings.

Following judgment, petitioner's new counsel filed motions for a new trial. The district court found that the issue of fraud in the inducement had been fully tried and recognized as an issue in the case by petitioner's attorney. With respect to petitioner's contention that he was prejudiced because he would have offered additional evidence and conducted additional discovery on the issue of reliance, the district court carefully

considered the proferred evidence and after a careful analysis, found it to be insubstantial (A. 35a-36a).[1]

First Circuit Court's Decision.

The petitioner at pages 7 and 8 contends that the First Circuit in affirming the judgment held that the sole test for determining implied consent was whether evidence was introduced that went only, as distinguished from incidentally, to the new issue, and whether that issue had been fully tried. Petitioner further states that the court declined to consider whether additional evidence might have been offered had the issue been pleaded and that an unpleaded cause of action may be inferred solely on the basis of scraps of evidence gleaned from the record and without regard to whether the opposing party squarely recognized the claim was in issue. These contentions are untrue.

The circuit court's opinion demonstrates that:

a. There was no debatable question presented that fraud in the inducement had been established (A. 3a);

b. Rokowsky opened up and injected the new issue regarding the $16 million commitment into the trial (A. 5a);

c. Rokowsky admitted his fradulent plan and scheme. Indeed, his attorney attempted to defend his conduct as a perfectly sound business practice (A. 5a, 6a);

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[1] It is of interest that petitioner suggests that because the court initially denied the motion to amend, he was somehow precluded from offering evidence which he claims was then in his possession and which would have resulted in dismissal of the fraudulent inducement claim. If there were such evidence requiring dismissal it is beyond belief that petitioner never once mentioned it either at the conclusion of the case when the Rule 15(b) motion was argued fully by both sides, or in the post trial memorandum.

d. Rokowsky's opening the issue was done as a fully litigated matter and not incidentally or collaterally (A. 6a);

e. Having ruled that the petitioner fully litigated an issue raised first by him at trial and, further admitted by him, the court went on to consider additional criteria from which implied consent may also be found, *i.e.*, whether evidence was introduced that went only, as distinguished from incidentally, to the new issue. The court ruled that evidence was introduced which only went to the new issue. Rokowsky failed to object to respondents' inquiry into his intention not to perform the original agreement and respondents' reliance upon his misrepresentation, and he affirmatively elicited testimony on the new issue (A. 7a).

In addition to the district court's extensive treatment of the issue of prejudice and its finding of lack of material prejudice, the circuit court also recognized these issues. The circuit court specifically stated that Rokowsky failed to respond to the district court's inquiry as to what additional evidence he might have introduced, a failure that lasted for eleven months (A. 9a, 52a).

The circuit court further noted that the petitioner did not object at the time Robert Gordon testified that he had relied on Rokowsky's representations. The time to object was then and not now. Of course, as pointed out by the district court, this line of inquiry was pursued by petitioner at the trial (A. 33a, 34a).

Reasons for Denying the Writ.

I. There is No Conflict Between the Circuits Regarding the Standards to be Applied in Allowing a Rule 15(b) Amendment.

In an effort to create a conflict where there is none, the petitioner contends that the First and Fifth Circuits, contrary to other circuits, have adopted a principle that in Rule 15(b) cases, consent can be "divined from snippets of evidence" in the record that may relate to the unpleaded issue alone and from a party's unwitting failure to object to such isolated testimony. The petitioner characterizes this alleged principle as "a rule of inadvertent consent." However, neither the First Circuit nor the Fifth Circuit have adopted such a holding and the suggestion that these circuits apply a rule of inadvertent consent is wholly without foundation.

In order to make this point, petitioner intentionally disregards the fact that the First Circuit found that petitioner had introduced the new issue, admitted his fraudulent scheme and that the new issue was fully litigated.

Moreover, in his disengenious attempt to create conflict, petitioner has cited cases which are distinguishable on their particular facts. Rather than conflict, there is uniformity among the circuits on the factual basis necessary to support a finding under Rule 15(b) that an unpleaded claim was tried by express or implied consent of the parties.

Rule 15(b) Standards.

The circuit courts have constantly relied on the presence of one or more of the following factors:

A. *Injection of the Issue by the Party.*

When the party against whom a Rule 15(b) motion has been allowed has himself injected the new issue, the courts of appeals uniformly uphold the allowance of the motion. The Third Circuit equates injection of the issue by a party with that party's having given implied consent to the trial of that issue. Thus in *Jurinko* v. *Edwin L. Wiegand Company*, 477 F.2d 1038 (3d Cir. 1973), a decision wholly ignored by petitioners, the court at the appellate level amended the pleadings under Rule 15(b), where the defendant during the course of presenting its defense injected the new issue. The Third Circuit said at 1045 n.18:

> We do not think that we are foreclosed from considering this theory of recovery for the issue of discrimination against women as a class was injected into the case by Wiegand *and was therefore* tried below with Wiegand's implied consent. By its own admission and evidence, Wiegand discriminated against women by employing a stereotyped characterization that women were physically unqualified for the jobs the plaintiffs had applied for. See, note 11, *supra*. See F.R.Civ.P. 15(b) and 16. Rule 16 should be read in light of Rule 15(b). See 3 Moore's Federal Practice ¶15.13[1], at 982 and note 11 cited to that text. (Emphasis supplied.)[2]

The Third Circuit was persuaded that implied consent flowed from defendant's having raised the issue in the first instance and having introduced evidence on it.

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[2] *Accord*, *Hall* v. *National Supply Company*, 270 F.2d 379, 382-383 (5th Cir. 1959); *Lomartira* v. *American Automobile Insurance Co.*, 371 F.2d 550 (2d Cir. 1967).

B. *Admissions During the Trial.*

A party's admitting to illegal or improper conduct on an unpleaded issue mandates an amendment of the pleadings under Rule 15(b). In the case of *J.C. Millett Co.* v. *Distillers Distributing Corp.*, 258 F.2d 139, 144 (9th Cir. 1958), the court stated as follows:

> However, at the trial on a long and pressing examination, one of the Importer's ex-specialty men, who contacted retailers to advertise the Distributor's products, admitted that he was ordered by the Importer to discourage these retailers from placing orders with the Distributor. This evidence is uncontradicted. Such damaging action is a clear breach of paragraph 6 of the contract in which the agent agrees to "promote the sales of its products," a provision necessarily implying an agreement that the agent would not engage in activities hurtful to the Distributor.
>
> The Distributor moved for an amendment of paragraph IX of its complaint to conform to this proof which the court denied. We hold this was error.[3]

When a party injects the new issue into the case and/or admits to improper conduct, all the circuits addressing these facts deem such conduct to be sufficient evidence of implied consent. In *Weigand* and other cases cited above, the circuit courts make no mention of whether the defendant "understood" that the new issue was in the case. Introducing the issue into the case and making admissions are the equivalent of notice and knowledge.

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[3] *See also, T.J. Stevenson & Co., Inc.* v. *81,193 Bags of Flour*, 629 F.2d 338, 370 (5th Cir. 1980).

C. *Where There is No Admission and the Party Against Whom the Motion was Allowed did Not Inject the New Issue, the Circuits Require Sufficient Facts to Demonstrate that the Parties had Reason to Understand or were Fairly Apprised that the New Issue was in the Case.*

The petitioner argues that the First and Fifth Circuits have adopted a principle that consent can be "divined from snippets of evidence" in the record that may relate to the unpleaded issue alone and from a party's unwitting failure to object to such isolated testimony. The petitioner characterizes this as "a rule of inadvertent consent." Unfortunately for petitioner's argument, neither the First Circuit nor the Fifth Circuit have adopted such a holding and the suggestion that these circuits apply a rule of inadvertent consent is wholly without foundation. This thesis is disproven when decisions of the First Circuit and Fifth Circuit are scrutinized in light of the particular facts involved in each decision. An example of this is found in *Jakobsen* v. *Massachusetts Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975), where the First Circuit affirmed the trial court's refusal to allow a new defense by motion after the presentation of evidence because there was insufficient evidence that the parties had reason to understand the new defense was in the case. On that point, the First Circuit said:

> Doubtless, when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed. Under Rule 15 the district court may and should liberally allow an amendment to the pleadings if prejudice does not result. And if an affirmative defense is actually tried by implied consent, the pleadings may be later made to conform. Fed.R.Civ.P. 15(b). But the defense in question was not tried by implied consent. Some of the evidence received at trial was relevant to it as well as to

other issues — for example, exhibits showing the layout of roads at the terminal and of the spot where plaintiff fell. *But plaintiff had no reason to understand that this issue was in the process of being tried.* Consent cannot possibly be implied under such circumstances.[4] (Emphasis supplied.)

The Fifth Circuit is also clearly in accord with the Third, Sixth and District of Columbia Circuits on similar facts. This is demonstrated in *Bettes* v. *Stonewall Insurance Co.*, 480 F.2d 92, 94 (5th Cir. 1973), and *Kingsley* v. *Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1142 (5th Cir. 1977). These cases establish that, in the absence of introducing the issue or admissions, the First and Fifth Circuits scrutinize the record to ascertain that the issue was litigated and that the parties had reason to understand that the issue was in fact being tried. It cannot fairly be said that there is any conflict between the First, Fifth and the Third or any other circuits. Moreover, whether the parties had reason to understand flows from failing to object to evidence going only to the new issue and from participation by both parties in direct and cross-examination on the new issue.

The Sixth Circuit, in *MBI Motor Company, Inc.* v. *Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974), utilized by petitioner in attempting to fabricate a conflict, cited the Fifth Circuit cases of *Wallin* v. *Fuller*, 476 F.2d 1204, 1210 (5th Cir. 1973) and *Bettes* v. *Stonewall Ins. Company, supra*, for the proposition that a trial court may not base its decision upon an issue that was tried inadvertently. Further, the Sixth Circuit specifically relied upon *Bettes* for the principle that

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[4] *See also, Vargas* v. *McNamara*, 608 F.2d 15, 17, 19 (1st Cir. 1979) and *Keeler* v. *Hewitt*, 697 F.2d 8 (1st Cir. 1982).

implied consent is not established merely because evidence relevant to the unpleaded issue was introduced without objection and that it must appear that the parties had reason to understand the evidence was aimed at the unpleaded issue.

If the Sixth and Fifth Circuits were in conflict such harmony would not be so clearly evident. In fact, there is no conflict.

1. The Circuit and District Courts Did Consider and Correctly Ruled that Petitioner was Not Prejudiced by the Amendment.

The petitioner further contends that the First Circuit gives no consideration to whether a party could have offered additional probative evidence. In essence, petitioner appears to be contending that the First Circuit ignores the issue of prejudice when reviewing a Rule 15(b) case.

This contention is completely false. The First Circuit rulings in *Jakobsen*, *supra*, *Vargas*, *supra*, *Keeler*, *supra*, and the case at bar demonstrate conclusively that lack of undue prejudice is a necessary requirement for the allowance of a Rule 15(b) motion.

Moreover, the district court in the case at bar made an extensive inquiry into the issue of prejudice, *i.e.*, whether the petitioner had additional evidence it could have introduced on the new issue. The court found petitioner's assertion of prejudice to be insubstantial (A. 35a-37a). Contrary to petitioner's assertion that the First Circuit ignores whether a party could have introduced additional evidence, the First Circuit in the case at bar did consider that factor and ruled that Rokowsky had failed to cite any additional evidence either when directly asked by the trial court at case end or in post-trial memoranda (A. 9a, 52a).

2. The Cases Cited by the Petitioner are Distinguishable on their Facts and do Not Support his Contention that there is a Conflict Among the Circuits.

The cases relied on by petitioner in an effort to create a conflict have absolutely no factual similarity with the case at bar or the Fifth Circuit cases selected by him for comparison.

For example, in *MBI Motors, supra,* the court found that the testimony that was adduced and relied upon by the plaintiff was relevant also to the pleaded issue, that the parties in direct and cross-examination of witnesses concentrated only on the pleaded issues and that such conduct along with the statements made by counsel to the court during the trial persuaded the Sixth Circuit that neither the plaintiff nor the defendant believed that they were trying the new issue.

Similarly, the Third Circuit's decision in *Schultz* v. *Cally,* 528 F.2d 470 (3d Cir. 1975), is not in collision with the First Circuit's ruling in this case.

In *Cally,* the parties tried a state common law claim. There was in fact no diversity of citizenship and substantive facts necessary to support federal question jurisdiction were neither pleaded nor tried. On an incomplete record the circuit court remanded the case for further hearings on the question of the existence of federal jurisdiction and the propriety of exercising pendant jurisdiction. There was simply no adequate basis on this limited record for the appeals court to make a determination under Rule 15(b). *Cally,* therefore, is in marked contrast to the case at bar.

Moreover, it is apparent that on similar facts the First Circuit would have reached the same result as the Third Circuit in *Cally.* Compare *Jakobsen* v. *Massachusetts Port Authority, supra* at 12. Also compare *Cally* with *Niedland* v. *United States,* 338 F.2d 254, 258 (3d Cir. 1964) cited by *Cally.* In *Neidland* the court found that the unpleaded issue had been

litigated. It did so because "the defendant not only stood silently by when the evidence was offered on behalf of the plaintiff, but also vigorously defended on this issue." *Id.* at 259.

Similarly, plaintiff's reliance on *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 478 & n.370 (D.C. Cir. 1976), is misplaced. In a five-week trial, the party against whom the Rule 15(b) motion was sought had only appeared in court on two occasions and had not even introduced evidence. Moreover, the plaintiff had been joined as a nominal party originally and the record was devoid of any facts which could have placed that defendant on notice that a new issue was in the case. On that factual basis, the District of Columbia Circuit found that there was absolutely no basis for allowing a Rule 15(b) motion.

It is misleading in the extreme for petitioner to have selectively culled cases having absolutely no factual similarity with the facts before the First Circuit in the case at bar. It is manifestly clear that the First and Fifth Circuits would, and have, reached the same results on similar facts.

3. Merely Opposing a Rule 15(b) Motion when Presented will Not Preclude Trial by Implied Consent when the New Issue was Fully Litigated Prior to and After Opposition to the Motion.

Prior to the filing of the Rule 15(b) motion on the sixth day of trial, the petitioner had injected the new issue, had admitted his fraudulent scheme and practice, had failed to object to respondents' inquiry as to his intention not to perform and, indeed, actually *elicited* affirmative testimony to the effect that the respondents relied on the so-called Freshwater commitment (A. 5a-7a). When the motion to add the issue of fraud in the inducement of the original contract was made, the court, in denying it without prejudice, stated "at the close

of this case, I won't preclude you from raising it again." (A. 52a.)

Thereafter, the petitioner failed to object, and, indeed participated in interrogation of witnesses on the new issue (A. 7a, 33a-35a, 36a). In reply to petitioner's argument below that the mere fact of their opposition to the motion to amend precluded the allowance of a 15(b) motion, the First Circuit said:

> Whatever may have been the purpose of Rokowsky's opening the issue of the contract's initiation and the $16 million commitment, the fact is he did, not incidentally and collaterally, *but as a direct and fully litigated matter.* The fact that he objected to the amendment to conform with what it led to did not mean that implied consent could not be found from his conduct. *See, e.g., Dunn* v. *TWA, Inc.*, 9 Cir., 1978, 589 F.2d 408, 412-13; *deHaas* v. *Empire Petroleum Co.*, 10 Cir. 1970, 435 F.2d 1223, 1228-29; *Cohen Sons & Co.* v. *Koch*, 1 Cir., 1967, 376 F.2d 529, 632-33. (A. 6a-7a) (emphasis supplied) (footnote omitted).

From the above language, it is clear that the court does not "stand the meaning of consent on its head" as petitioner argues. Rather, it is the petitioner who is confusing the issue and intentionally misinterpreting the meaning of implied consent.

In the face of a litigant's having injected the new issue, having admitted an intent to defraud, failing to object to evidence bearing only upon the new issue and himself participating in direct and cross-examination on the unpleaded issue, the simple act of opposing the motion can never be deemed to relieve petitioner from the consequences of his conduct prior to and after the motion to amend was raised. To hold otherwise would render Rule 15(b) a nullity.

In accord with this manifestly proper view of Rule 15(b) are not only the cases cited by the First Circuit from the Ninth Circuit and Tenth Circuit, but also *Niedland* v. *United States, supra*, and *T.J. Stevenson and Co., Inc.* v. *81,193 Bags of Flour, supra* at 629 F.2d 370, the Third and Fifth Circuits respectively.

The petitioner has intentionally confused this issue by citing cases in which parties have consistently objected to introduction of evidence on the new issue, thus negating any implied consent. In the case at bar, as the district court and the circuit court have found, there was full participation in the actual trial of the new issue throughout the case. Petitioner can cite no case in which a party, having fully litigated the new issue, has defeated the application of Rule 15(b) by the simple expedient of subsequently objecting to the allowance of the motion to conform to the proof already in the case.

Petitioner's reliance on *Nerenhausen* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 479 F. Supp. 750 (D. Minn. 1979) is wholly misplaced and underscores their desperate attempt to create conflict where there is none. *Nerenhausen* was an employee suit against the railroad under the Federal Employers Liability Act. Because the injury involved equipment manufactured by Westinghouse, the railroad impleaded Westinghouse as a third-party defendant. Not until after opening arguments did the plaintiff seek to move in accordance with Rule 15(a) to join Westinghouse as a direct party defendant. That motion was denied and the trial went forward with Westinghouse relying on the fact that its only potential liability was to the third-party plaintiff as an indemnitor. After the jury rendered a verdict in the amount of $150,000 to the plaintiff and in the amount of $75,000 against Westinghouse as an indemnitor, plaintiff moved under Rule 15(b) to seek a claim directly against Westinghouse. That motion was properly denied by the district court and we believe it is obvious that those circumstances have absolutely no bearing

upon the case at bar. The entire trial proceeded on the basis that Westinghouse need only defend on the third-party action.

The remaining district court cases cited are of no assistance to petitioner. They all contain factual situations wherein the opposing party immediately objected to any evidence relating to the new issue, thus negating any potential finding of implied consent. In *Keeler* v. *Hewitt, supra*, the First Circuit demonstrates that it is in accord with all of the cases cited by petitioner. There, the First Circuit did not find implied consent when the defendant repeatedly objected to the introduction of any evidence bearing upon the new issue.

The suggestion that the First Circuit ruling in all the circumstances of this case "is a summons to trickery by litigants in search of a winning theory" is an unfounded affront to that court, especially where petitioner blatently introduced evidence at the trial which showed that he had consistently and continuously lied to the respondents and subsequently lied to the district court concerning his intention to pay $16 million of the purchase price in cash and concerning the availability of cash for that purpose (A. 16a). To contend, as petitioner does, that he should be relieved of the consequences of his admitted fraud and scheme because he subsequently objected to the allowance of a Rule 15(b) motion designed to conform the pleadings to the evidence of his fraud is ludicrous and deserves no judicial consideration whatsoever.

II. Petitioner was Not Deprived of his Seventh Amendment Right to Trial by Jury.

In setting the tone for his Seventh Amendment argument, petitioner does not proceed from the facts in this case. Rather, deliberately ignoring them, he postulates at page 16 of his petition that the district and circuit courts ruled that a party's fail-

ure to object to evidence that later turned out to bear upon an unpleaded cause of action was *alone* sufficient to constitute a waiver of the Seventh Amendment and that that ruling placed the First Circuit in conflict with other circuits.

The petitioner again deliberately ignores the findings and rulings of the district court and the First Circuit that he injected the new issue, admitted his fraudulent scheme, failed to object to evidence on the new issue and in fact vigorously participated in both direct and cross examination on the new issue. It is so plain from a simple reading of both the district court's and circuit court's opinions that one wonders why petitioner insists on trying to force this case into a set of facts which are not in accordance with reality. The case before the First Circuit was one in which a litigant at the outset waived a trial by jury on a contract claim and an issue of fraud in the inducement of the renegotiated contract. In that context, he blatently admitted that he committed fraud in the inducement of the original contract. That admission further led to direct and cross-examination on every aspect of the new fraud issue both before and after respondents made their motion under Rule 15(b).

The petitioner did not raise the question of a jury trial when the judge said he would permit the Rule 15(b) motion to be raised again at the end of the case. The petitioner did not raise the issue of a jury trial when, at the close of the case, the trial judge heard argument on the Rule 15(b) motion and advised counsel that he was taking the matter under advisement. Moreover, the petitioner never raised the question of a jury trial in his post-trial memorandum. In short, the First Circuit's ruling that "this is not a case where the amendment called for a further trial" and hence there was no deprivation of a jury trial, is fully in accord with the authorities.

The 6th Circuit's opinion in *Arber* v. *Essex Wire Corporation*, 490 F.2d 414, 423-424 (6th Cir. 1974) is squarely in point

on this question. After the close of the evidence in that case, the court indicated to the parties that the federal cause of action was still open, that he had heard evidence on the matter, and that the parties should submit briefs addressing the merits of the federal cause of action because, in his final judgment, he would consider whether to reinstate the federal action or limit the case to the state claim. In affirming the trial court, the circuit court stated that by so advising the parties, trial court was not obligated to impanel a jury when it decided to reinstate the federal claim after the case had been tried.

In reaching its conclusion, the Sixth Circuit held:

> When new legal issues arise during the course of a non-jury trial, they can certainly be determined by the court with the express or implied consent of the parties. Scholl v. Scholl, 80 U.S.App.D.C. 292, 152 F.2d 672 (1945); Fidelity and Deposit Co. v. Krout, 157 F.2d 912 (2d Cir. 1946); Smith v. Cushman Motor Works Co., 178 F.2d 953 (8th Cir. 1950). *See generally*, 5 Moore's Federal Practice § 38.41, 329 (1971). Here appellants' counsel not only failed to suggest to the court that the revived federal claims raised new legal issues, but also appears to have agreed to trial by the judge alone of all issues on the 10b-5 claim.

Id. at 423.

In 5 Moore's Federal Practice, ¶38.41 (2d ed. 1982) at 38-371, the following comment and analysis is made:

> If the new issue, although not raised by the pleadings, is legal, but is tried to the court by the express or implied

> consent of the parties and without any demand for jury trial having been made at the time the new issue was injected into the case, any right of jury trial has been waived and a party may not thereafter properly contend that he was denied his constitutional right of a jury trial. (Footnote omitted.)

It is critical in the consideration of this issue to distinguish between an amendment to conform pleadings to the evidence already introduced, and an amendment to permit the proponent to thereafter introduce evidence on a new factual issue. The express or implied consent which permits an amendment, subsequent to trial, to conform to the evidence is also held to bar the defendant from subsequently demanding a jury trial on those same issues. 5 Moore's Federal Practice, *supra*.

It is difficult to conceive of a more apparent waiver of a jury claim in a Rule 15(b) context than in the case at bar. Rokowsky was on notice that his fraudulent conduct was an issue in the case, and, having waived a jury, opened the door on his plan to defraud the Gordons by his own admissions.

As with the prior issues, petitioner seeks certiorari by citing cases which on their facts have no applicability to the case at bar.

The suggestion by petitioner that the First Circuit in this case ignores basic Seventh Amendment teachings is unfounded. Their own cases support the First Circuit's decision.

Thus, for example, in *Bowles* v. *Bennett*, 629 F.2d 1092 (5th Cir. 1980) the Fifth Circuit acknowledges that a jury trial can indeed be waived by implication. In the particular facts of that case, a trial judge tried to convince counsel to participate in a combined hearing on an injunction and a trial on the merits. Counsel continually refused to do so and after a lengthy dialogue, flatly informed the court that he was not in a

position to agree to combining the hearing on the injunction with a final submission. Notwithstanding this clear refusal to a trial on the merits, the court rendered a final judgment. Under these circumstances, the rule in *Bowles* has no applicability to this case.

In *Heyman* v. *Klein*, 456 F.2d 123 (2d Cir. 1972) a trial judge intent upon expediting a jury-waived trial, on motion, struck the defendant's demand for jury which had been timely filed as part of the defendant's answer. At a time when his answer was not yet due to be filed, defendant's counsel stood silent when the trial judge said that he would try the case without a jury. However, in his answer, the defendant timely claimed a jury. The Second Circuit held that under these circumstances, waiver prior to the time for demanding jury trial must be based upon nothing less than an affirmative representation that the client has determined not to claim a jury trial. The particular facts in *Heyman* have no bearing on the case at bar and the principles enunciated therein do not apply to the facts in this case.

Similarly inapposite is petitioner's contention that the case of *Johnson* v. *Harrah's Club*, 30 F. R. Serv. 2d 1153, 1154 (9th Cir. 1980) is squarely in conflict with the First Circuit's decision. There is absolutely no conflict between these two decisions.

In that case,[5] the 9th Circuit found it was an abuse of discretion for the district court to have allowed the amendment of the complaint because it found the issue had not been tried by express or implied consent of the parties. The Court said at 1153: "In the instant case, A Title VII action was tried. The breach of employment contract issue was only inferentially suggested by the evidence adduced by the parties. It was an abuse of discretion to allow amendment of the complaint."

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[5] By local rule, the *Johnson* decision may not be cited as precedent in the Ninth Circuit.

Accordingly, when the court ruled that the party had not impliedly consented to the trial of the new issue, *a fortiori* the party had not expressly or impliedly waived a jury trial on that issue.

When a litigant during a non-jury trial introduces a new issue, fully litigates that issue, makes admissions regarding it, and fails to demand a jury trial despite numerous opportunities to do so, he has waived his right to a jury trial. It is just this set of facts that the First Circuit dealt with.

III. The Petitioner was Not Deprived of Due Process by the Allowance of the Amendment After Trial.

Petitioner claims that the First Circuit's decision deprived him of the right to due process of law. As with the other issues raised in his petition, the facts are simply misstated and the court's decision distorted.

Despite the clear showing in both the district court's and circuit court's opinions that this is a case in which petitioner first injected the issue, made admissions concerning his fraud in the inducement and fully litigated the matter, petitioner insists that the only notice he received at trial were "two scraps of evidence which he reasonably believed related to claims already in issue." That contention is an absolute misstatement of fact.[6] Petitioner was put on notice in the pre-trial state-

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[6] The petition for certiorari is not the first time that petitioner has taken the opportunity to misstate the facts in the case. His previous attempt prompted the First Circuit to comment:

> "(1) Petitioner alleged in that petition, . . . the only claims asserted against Mr. Rokowsky were for breach of contracts to buy real estate.

This is a flat misstatement; the Gordons also alleged, at the start, fraud in the inducement of the renegotiated contracts (Rokowsky's asserted access to $6 million)." (A. 5a).

ment that the respondents were claiming fraud in the inducement of the non-negotiable promissory note and renegotiated contracts in July, 1974.

At the trial he injected the issue of fraudulent inducement of the original contract and made admissions which disclosed that his fraudulent scheme had commenced prior to the execution of the original contract. It is of extreme importance that petitioner's counsel did not attempt to retreat from the admission but rather brazenly told the court that it was petitioner's standard practice, that after executing a contract promising to pay cash, he negotiated the cash price down by telling untruths to the sellers (A. 5a). If this were not notice enough, when the motion to add the issue of fraud with respect to the original contract as well as the renegotiated contracts was made mid-trial to conform the pleadings to the proof, the court, in denying the motion without prejudice stated "at the closing of this case I won't preclude you from raising it again." (A. 52a.)

As the First Circuit stated, "surely, this was full warning." (A. 52a.)

Moreover, petitioner's assertion that he possessed evidence which he did not introduce and which would have led to a dismissal of the respondent's claim, is without basis in the record. Neither at the close of the trial, when queried by the district court, nor in the post-trial memorandum did the petitioner suggest any additional probative evidence that he would have introduced on the new issue (A. 52a). In ruling on the petitioner's motion for a new trial based upon the alleged contention that he had additional evidence that was not introduced, the district court found his assertion of prejudice to be insubstantial and no basis for denying the motion to amend or for granting a new trial on the issue.

The petitioner utterly failed to demonstrate any prejudice at all, let alone any undue or material prejudice required by the decisions of the various circuit courts on Rule 15(b) motions.

T.J. Stevenson & Co., Inc. v. *81,193 Bags of Flour*, *supra*; *deHaas* v. *Empire Petroleum Co.*, *supra*; *Mineral Industries & Heavy Construction Group, Brown & Root, Inc.* v. *Occupational Safety and Health Review Commission*, 639 F.2d 1280, 1294 (5th Cir. 1981); *Northern Oil Company* v. *Socony Mobil Oil Company*, 347 F.2d 81 (2d Cir. 1965); *Jurinko* v. *Edwin L. Wiegand Co.*, *supra*.

At the conclusion of the case, the trial court told petitioner that it wanted full argument on the Rule 15(b) motion. After full argument by both sides, it informed counsel that it was taking the motion under advisement and would decide it as a part of the final decision. At that time petitioner should have informed the court that he had additional evidence not yet adduced, or that a continuance was necessary for such purpose. *See*, *Northern Oil Company* v. *Socony Mobil Oil Company*, *supra* at 83, 84.

It is too late for petitioner to say he was precluded from raising additional evidence because he did not know that the court would change its mind and allow the amendment. The fallacy of this argument lies in petitioner's attempt to make it appear that the court changed its mind. It is apparent from the record that the court never changed its mind. The denial without prejudice and with the clear warning that the matter would be reconsidered at the conclusion of the trial placed everyone present on notice. Petitioner's contention of deprivation of due process because of lack of notice is absurd when he opened the issue, admitted the fraud and fully litigated that issue and utterly failed to demonstrate any prejudice.

Conclusion.

Based upon the pleadings and the pre-trial statement, petitioner was on notice that he would have to prepare for and

meet at trial a claim that he had made fraudulent misrepresentations of fact which induced respondents to renegotiate the original contract and deliver a non-negotiable note in the amount of $640,000. During his direct testimony, petitioner constantly referred to his admitted practice of making a contract with a small deposit with the intention of ultimately renegotiating that contract by telling lies to the seller in an effort to cause the seller to reduce the cash purchase price and take back a purchase money mortgage.

After the trial court gave notice that respondents' motion to amend could be raised at the conclusion of the case, petitioner continued by direct and cross-examination to litigate the new issue. The trial court gave petitioner every opportunity to articulate substantive objections to his considering as an issue in the case the question of fraud in the inducement which petitioner had fully tried. He failed to so do.

On these facts, there is unanimity among the courts of appeals and not one would have reversed the trial judge's findings that the new issue was tried by the implied consent of the parties. Furthermore, there is no conflict among the circuit courts on any aspect of the judicial administration of Rule 15(b). Rather, all of the decisions relied upon by petitioner can be clearly distinguished on their particular facts.

Where petitioner's trial of the new issue resulted from his injection of that issue and admissions of his fraudulent conduct the First Circuit did not err in deeming that conduct to be a clear waiver of a right to trial by jury. Petitioner was hardly a victim of "federal rules invoked . . . in derogation of constitutional norms." If he were a victim at all, it was from self-inflicted wounds.

We respectfully submit there is no basis upon which to grant certiorari in this case and we ask the court to deny the petition.

Respectfully submitted,

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